No. 16-405
Title: BNSF Railway Co., Petitioner
v.
Kelli Tyrrell, Special Administrator for the Estate of Brent T. Tyrrell, Deceased, et al.
Docketed: September 28, 2016
Linked with 16A67
Lower Ct: Supreme Court of Montana
Case Nos.: (DA 14-0825)
Decision Date: May 31, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 18 2016	Application (16A67) to extend the time to file a petition for a writ of certiorari from August 29, 2016 to September 28, 2016, submitted to Justice Kennedy.
Jul 20 2016	Application (16A67) granted by Justice Kennedy extending the time to file until September 28, 2016.
Sep 28 2016	Petition for a writ of certiorari filed. (Response due October 28, 2016)
Oct 20 2016	Order extending time to file response to petition to and including November 28, 2016.
Oct 28 2016	Motion for leave to file amicus brief filed by The Association of American Railroads.
Oct 28 2016	Motion for leave to file amicus brief filed by Washington Legal Foundation.
Oct 28 2016	Motion for leave to file amicus brief filed by National Association of Manufacturers.
Oct 28 2016	Motion for leave to file amici brief filed by The Chamber of Commerce of the United States of America, et al.
Nov 28 2016	Brief of respondents Kelli Tyrrell, Special Administrator for the Estate of Brent T. Tyrrell, Deceased, et al. in opposition filed.
Dec 13 2016	Reply of petitioner BNSF Railway Co. filed.
Dec 14 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Motion for leave to file amicus brief filed by National Association of Manufacturers GRANTED.
Jan 13 2017	Motion for leave to file amici brief filed by The Chamber of Commerce of the United States of America, et al. GRANTED.
Jan 13 2017	Motion for leave to file amicus brief filed by The Association of American Railroads GRANTED.
Jan 13 2017	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED.
Jan 13 2017	Petition GRANTED
Jan 17 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Petitioner.
Feb 17 2017	SET FOR ARGUMENT ON Tuesday, April 25, 2017
Feb 21 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Respondents.
Feb 24 2017	Record requested from the Supreme Court of Montana.
Feb 27 2017	Joint appendix filed. (Statement of costs filed.)

Feb 27 2017	Brief of petitioner BNSF Railway Company filed.
Mar 2 2017	Record received from the Supreme Court of Montana. The record is electronic.
Mar 6 2017	Brief amici curiae of Washington Legal Foundation, and Allied Educational Foundation filed.
Mar 6 2017	Brief amici curiae of The Chamber of Commerce of the United States of America, et al. filed.
Mar 6 2017	Brief amicus curiae of United States filed.
Mar 6 2017	Brief amicus curiae of National Association of Manufacturers filed.
Mar 6 2017	Brief amicus curiae of Association of American Railroads filed.
Mar 6 2017	Brief amicus curiae of Professor Stephen E. Sachs filed.
Mar 7 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 22 2017	CIRCULATED.
Mar 24 2017	Record received from the Montana 13th Judicial District Court for Yellowstone County (1 envelope).
Mar 29 2017	Brief of respondents Kelli Tyrrell, Special Administrator for the Estate of Brent T. Tyrrell, Deceased, et al. filed. (Distributed)
Apr 3 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 4 2017	Brief amicus curiae of Academy of Rail Labor Attorneys filed. (Distributed)
Apr 5 2017	Brief amicus curiae of Brotherhood of Maintenance of Way Employees Division/IBT filed. (Distributed)
Apr 5 2017	Brief amicus curiae of The American Association for Justice filed. (Distributed)
Apr 17 2017	Reply of petitioner BNSF Railway Company filed. (Distributed)
Apr 25 2017	Argued. For petitioner: Andrew S. Tulumello, Washington, D. C.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Julie A. Murray, Washington, D. C.
May 30 2017	Judgment REVERSED and cases REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Breyer, Alito, Kagan, and Gorsuch, JJ., joined. Sotomayor, J., filed an opinion concurring in part and dissenting in part.
Jul 3 2017	MANDATE ISSUED.
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RECORD AND BRIEFS

16-405

FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), this Court held that the Due Process Clause forbids a state court from exercising general personal jurisdiction except where the defendant is "at home." BNSF Railway Company is not at home in Montana under *Daimler*, yet the Montana Supreme Court held that BNSF is subject to general personal jurisdiction in Montana, and can be sued there by out-of-state plaintiffs for claims that have no connection at all to the state. The Montana Supreme Court explicitly "declined" to apply this Court's decision in *Daimler*, for two reasons: First, because the facts of this case involve American parties and arose in the United States, not foreign parties and an overseas injury as in *Daimler*. Second, because the plaintiffs here sued under the Federal Employers' Liability Act (FELA), which is a different federal cause of action from the ones at issue in *Daimler*. Section 56 of FELA establishes *venue* for cases filed in federal court, and it provides for concurrent *subject-matter* jurisdiction in state courts. Yet the Montana Supreme Court held that this provision authorizes state courts to exercise *personal* jurisdiction, and that the statute overrides the limitations of the Due Process Clause.

The question presented is:

Whether a state court may decline to follow this Court's decision in *Daimler AG v. Bauman*, which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not at home in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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PETITION FOR A WRIT OF CERTIORARI

BNSF Railway Company ("BNSF") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Montana in this case.

OPINION BELOW

The opinion of the Supreme Court of Montana (Pet. App. 1a–33a) is reported at 373 P.3d 1.

JURISDICTION

The Supreme Court of Montana entered its judgment on May 31, 2016, accompanied by an opinion deciding the federal question presented in this petition. The court filed a corrected opinion with non-substantive revisions on June 7, 2016. Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 28, 2016.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Montana Supreme Court's "judgment is plainly final on the federal issue" of personal jurisdiction under the Due Process Clause, which "is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975). BNSF "may prevail at trial on nonfederal grounds," thereby preventing this Court's review of the federal issue, and if the Montana Supreme Court erroneously found personal jurisdiction, then "there should be no trial at all." *Ibid.* In *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977), this Court held that it has jurisdiction under Section 1257(a) to review a state court's assertion of personal jurisdiction. This Court also granted certiorari in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), which had exactly the same posture as this case: a state-court judgment affirming, before trial, the denial of a motion to dismiss for lack of personal jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of tne Constitution of the United States provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The relevant portion of the Federal Employers' Liability Act, 45 U.S.C. § 56, provides:

> ...
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

The relevant portion of the Montana long-arm statute, Montana Rule of Civil Procedure 4(a), (b), provides:

> (a) Definition of Person. As used in this rule, the word "person," ... includes:
>
> ...
>
> (3) a corporation;
>
> ...
>
> (b) Jurisdiction of Persons.
>
> (1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts ...

INTRODUCTION

The Montana Supreme Court has "decline[d]" to follow this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Pet. App. 15a. This Court in *Daimler* held that the Constitution limits general personal jurisdiction to only those forums where the defendant is "at home," which for a corporation is the place of incorporation or principal place of business (absent exceptional facts). 134 S. Ct. at 760. Nevertheless, the Montana Supreme Court held that BNSF, a Delaware corporation with its principal place of business in Texas, is subject to general personal jurisdiction in Montana, and can be sued in Montana by out-of-state plaintiffs for claims that have no connection whatsoever to Montana.

The Montana Supreme Court offered only the most superficial rationales for refusing to apply *Daimler*: The court first held that *Daimler* is limited to its facts (transnational injuries and parties incorporated overseas), whereas this case arose in the United States and all parties are American. By attempting to limit *Daimler*'s holding in this way, the Montana Supreme Court disagreed with at least 11 federal circuit courts and other state courts of last resort.

The Montana court also refused to apply *Daimler* on the ground that the plaintiffs here pled claims under the Federal Employers' Liability Act (FELA), which was not at issue in *Daimler*. FELA is a federal statute that includes a venue provision for cases in federal court, and it provides for concurrent subject-matter jurisdiction in state courts. Yet the Montana Supreme Court held that FELA confers *personal* jurisdiction on state courts, even though the Due Process Clause would forbid it. The Montana Supreme Court joined one other state supreme court, and split

with three others, on whether FELA obviates the limitations of the Due Process Clause on state courts' exercise of personal jurisdiction.

The Montana Supreme Court's distinctions of *Daimler* are transparently wrong. This Court's holdings are not narrowly confined to their particular facts, FELA does not confer personal jurisdiction on state courts, and no statute could possibly trump the Constitution's limits on personal jurisdiction. This Court's review is necessary in order to resolve the splits, to protect the Court's precedents, and to ensure due process.

STATEMENT

A. The Constitution Limits State Courts' Personal Jurisdiction

This Court has held that the Due Process Clause of the Fourteenth Amendment "sets the outer boundary of a state tribunal's authority" to exercise personal jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). Ever since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court has held that the Constitution authorizes two distinct categories of personal jurisdiction. *Goodyear*, 564 U.S. at 919. The "dominant" mode is *specific* personal jurisdiction, *Daimler*, 134 S. Ct. at 758, which allows a state court to hear a suit that "arises out of or relates to the defendant's contacts with the forum," *Goodyear*, 564 U.S. at 923–24 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). By contrast, when the cause of action does not arise out of the defendant's contacts with the forum state, a state court may still exercise *general* personal jurisdiction, but only if the defendant's "affiliations with

the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state." *Id.* at 919 (quoting *International Shoe*, 326 U.S. at 317).

Justice Ginsburg's opinion for the Court in *Daimler* explained that, since *International Shoe*, it is "specific jurisdiction [that] has become the centerpiece of modern jurisdictional theory, while general jurisdiction has played a reduced role." 134 S. Ct. at 755. In other words, cases must usually be brought where they arise. General jurisdiction exists only "as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it." *Id.* at 758 n.9. For that reason, "only a limited set of affiliations with a forum will render a defendant amenable" to general jurisdiction. *Id.* at 760.

With respect to "foreign (sister-state or foreign-country) corporations," the defendant is at home in its "place of incorporation and principal place of business." *Daimler*, 134 S. Ct. at 754, 760. Only in a case with "exceptional" facts, such as where the defendant has relocated to a "surrogate" head office in a time of war, can the defendant be at home in any other state. *Id.* at 756 n.8.

Daimler rejected, as "unacceptably grasping," the contention that a corporate defendant can be subject to general jurisdiction in every state where it "engages in a substantial, continuous, and systematic course of business." 134 S. Ct. at 761. That is because general jurisdiction "does not focus solely on the magnitude of the defendant's in-state contacts," but "instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20.

B. Factual Background

1. BNSF is a rail carrier incorporated in Delaware. Pet. App. 3a. Its principal place of business is Texas. *Ibid.* All of BNSF's corporate headquarters and corporate officers are located in Texas. None of BNSF's corporate officers or departments has ever been located in Montana.

BNSF operates 32,500 miles of rail lines in 28 states and 2 Canadian provinces. Pet. App. 63a. BNSF has more track miles in Texas than in any other state. The company dispatches its trains and monitors its network from its Network Operations Center in Texas. BNSF generates more revenue from Texas than from any other state. Of BNSF's 43,000 employees, the company employs more people in Texas (approximately 20% of its workforce) than in any other state.

Montana is one state in which BNSF operates. But BNSF's revenues from Montana represent only a small fraction—less than 10%—of its nationwide business. Pet. App. 63a. Barely 6% of BNSF's total track mileage is located in Montana, and less than 5% of BNSF's total workforce is located in Montana. *Ibid.*

2. Respondents are two plaintiffs from outside Montana who allege that they were injured while working for BNSF outside Montana. They nevertheless brought suits in Montana state court against BNSF under FELA, 45 U.S.C. § 51.

Respondent Robert Nelson is a resident of North Dakota who is employed by BNSF as a fuel truck driver. Pet. App. 3a. In March 2008, while working for BNSF in Washington, Mr. Nelson slipped and fell, injuring his knee. Pet. App. 36a. He does not allege that he is or was a resident of Montana, that he has

ever worked for BNSF in Montana, or that his case is in any way connected to Montana. Pet. App. 3a.

Respondent Kelli Tyrrell is personal representative for the estate of Brent T. Tyrrell, a former employee of BNSF who worked in South Dakota, Minnesota, and Iowa. Pet. App. 2a–3a. The complaint alleges that, during Mr. Tyrrell's employment, he was exposed to "various carcinogenic chemicals" that caused him to develop renal cell carcinoma and ultimately resulted in his death in 2011. Pet. App. 3a. The complaint does not allege that any exposures occurred in Montana or that Mr. Tyrrell ever worked or lived in Montana. Pet. App. 3a–4a.

3. BNSF moved to dismiss both cases, arguing that the Due Process Clause prevents the Montana state courts from exercising personal jurisdiction over BNSF in these cases. The trial court in *Tyrrell* denied BNSF's motion to dismiss, Pet. App. 47a–73a, but it granted BNSF's motion to certify its ruling as final so that BNSF could appeal, Pet. App. 41a–46a. Meanwhile, another trial court in *Nelson* granted BNSF's motion to dismiss for lack of personal jurisdiction, Pet. App. 36a–40a, and the plaintiff appealed as of right. The Montana Supreme Court then accepted BNSF's appeal in *Tyrrell*, Pet. App. 34a–35a, and consolidated the cases.

C. The Montana Supreme Court Holds That *Daimler* Does Not Apply To This Case

A divided Montana Supreme Court held that it does not violate due process to subject BNSF to general personal jurisdiction in Montana state courts, and the court authorized out-of-state plaintiffs to sue BNSF in Montana on claims arising anywhere in BNSF's nationwide system. Pet. App. 5a–19a. The

Montana Supreme Court majority "decline[d]" to apply *Daimler*, a case it called "factually and legally distinguishable." Pet. App. 15a.

The Montana Supreme Court first held that this Court's constitutional ruling in *Daimler* was narrowly limited to cases with similar facts—*i.e.*, cases "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." Pet. App. 11a (quoting *Daimler*, 134 S. Ct. at 750). The Montana Supreme Court suggested that *Daimler* is inapplicable to cases like these, where the alleged injury occurred in the United States and "all parties involved are citizens of the United States." *Ibid.*

The Montana Supreme Court further distinguished *Daimler* because that case "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. The Montana court seized on 45 U.S.C. § 56, *see* Pet. App. 6a, which establishes venue for FELA cases filed "in a district court of the United States," and provides for "concurrent" *subject-matter* jurisdiction over FELA claims in state courts. Nevertheless, the Montana court held, citing cases that did not even mention *personal* jurisdiction, that *this Court* "consistently has interpreted [Section] 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a (citing *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953), and *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698 (1942)); *see also* Pet. App. 6a–7a (citing *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941)); Pet. App. 12a–13a (citing *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932)). And *Daimler*, the Montana court said,

"did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet. App. 12a.

In a separate portion of the opinion, the Montana Supreme Court held that BNSF is subject to general personal jurisdiction in Montana under state law, because BNSF is "found within" Montana. Pet. App. 15a–19a (quoting Mont. R. Civ. P. 4(b)(1)). The Montana Supreme Court stated that this exercise of personal jurisdiction "comports with the due process clause," based on its prior conclusions distinguishing *Daimler*. Pet App. 17a–18a.

Justice McKinnon dissented. Pet. App. 20a–33a. She criticized the majority for "[d]isregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler*," Pet. App. 20a, and would have held that there is "no sound basis to afford BNSF less constitutional protection than the defendants were afforded in *Goodyear* and *Daimler*," Pet. App. 26a. Justice McKinnon observed that the FELA precedents from this Court that were cited by the majority "hav[e] nothing to do with general jurisdiction under the Due Process Clause," that those cases "do not so much as mention the Due Process Clause or general jurisdiction," and they have never been cited by this Court "for any proposition remotely related to general jurisdiction." Pet. App. 27a–28a.

Justice McKinnon argued further that the majority's interpretation of FELA is deeply flawed because this Court has held that "Section 56 is a venue statute for the *federal courts*, not a grant of personal jurisdiction to state courts." Pet. App. 29a (emphasis added).

Moreover, "[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet App. 30a. And in any event, "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court has explicitly refused to follow this Court's precedents. The decision below is a transparent attempt to circumvent this Court's due-process rulings and restore the "doing business" test for personal jurisdiction that was rejected in *Goodyear* and *Daimler*. In purporting to distinguish *Daimler*, the Montana Supreme Court not only disregarded this Court's authority, it also opened or deepened multiple splits with federal courts of appeals and other state courts of last resort.

If the decision below is allowed to stand, it will systematically deny due process to out-of-state defendants in Montana's courts without any prospect of further remedy. This petition is not about error correction: BNSF alone currently faces no fewer than 32 lawsuits in Montana state courts brought by FELA plaintiffs whose claims have no connection to Montana, all of which should be dismissed for lack of personal jurisdiction under *Daimler*. In multiple other states, FELA plaintiffs continue to invoke the reasoning below and ask state trial courts to expand their own personal jurisdiction beyond the limits of the Due Process Clause. BNSF and other out-of-state defendants are certain to face hundreds more improper lawsuits in Montana unless this Court grants certiorari.

I. Certiorari Is Necessary To Address The Montana Supreme Court's Refusal To Apply This Court's Decision in *Daimler*

Under *Daimler*, BNSF clearly is not "at home" in Montana. BNSF undisputedly is not incorporated or headquartered in Montana. And while BNSF does business in Montana, its contacts there represent only a small fraction of its nationwide operations, Pet. App. 63a, just as the defendant in *Daimler* did only a small fraction of its worldwide business in the forum state of California, *see* 134 S. Ct. at 752.

The Montana Supreme Court did not even attempt to perform the comparative "at home" analysis that *Daimler* held is required by the Due Process Clause. *See* 134 S. Ct. at 762 n.20. Instead the Montana Supreme Court simply said that *Daimler* does not apply at all, in part because this case does not involve foreign parties and an overseas injury. Pet. App. 11a, 15a. The court thus held it sufficient for general personal jurisdiction that BNSF is "doing business," to any degree, in Montana. But *Daimler*, by its own terms, applies with equal force to cases with American parties and injuries that occurred in the United States. The Montana Supreme Court's attempt to confine *Daimler* to its facts is contrary to every other appellate court that has addressed the issue.

A. Eleven Federal Circuits Or State Courts Of Last Resort Have Refused To Limit *Daimler* To Transnational Cases

The Montana Supreme Court's decision created an 11-1 split on whether the "at home" rule for general personal jurisdiction applies in purely domestic cases.

The Second Circuit has expressly rejected the argument that *Daimler* "addressed personal jurisdiction

in an international context that is not present in this case." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629–30 (2d Cir. 2016). Instead, the Second Circuit noted that *Daimler* "did not limit its jurisdictional ruling" to transnational cases, and that *Daimler* "made explicit reference to 'sister-state' corporations and drew no distinction in its reasoning between those and foreign-country corporations." *Id.* at 630. The Second Circuit thus concluded that there is "no sound basis for restricting *Daimler*'s (or *Goodyear*'s) teachings to suits brought by international plaintiffs against international defendants." *Ibid.*

Similarly, the Colorado Supreme Court has explicitly rejected an attempt to distinguish *Daimler* on the ground that it "involved international disputes with foreign plaintiffs." *Magill v. Ford Motor Co.*, ___ P.3d ___, 2016 WL 4820223, at ¶ 19 (Colo. Sept. 12, 2016). "*Daimler*," the Colorado Supreme Court said, "cannot be disposed of so easily." *Ibid.* "Whether a nonresident corporate defendant is a resident of another country or another state is irrelevant to the general jurisdiction inquiry." *Ibid.*

Three other federal circuit courts have implicitly rejected the Montana Supreme Court's reasoning by applying *Daimler* in full to purely domestic corporations and events. *See Kipp v. Ski Enter. Corp. of Wis., Inc.*, 783 F.3d 695, 698 (7th Cir. 2015) (applying *Daimler* to reject general personal jurisdiction in Illinois over a Wisconsin corporation); *First Metro. Church of Houston v. Genesis Grp.*, 616 F. App'x 148, 149 (5th Cir. 2015) (per curiam) (applying *Daimler* to dismiss a suit against a Pennsylvania corporation); *Jones v. ITT Sys. Div.*, 595 F. App'x 662 (8th Cir. 2015) (per curiam) (applying *Daimler* to dismiss a suit against a

defendant that, as described by the district court, was a Delaware corporation with its principal place of business in Colorado).

At least six state courts of last resort have applied *Daimler* in full to cases involving domestic parties and events. *See Bristol-Myers Squibb Co. v. Superior Court*, ___ P.3d ___, 2016 WL 4506107, at *7–8 (Cal. Aug. 29, 2016) (applying *Daimler* to reject general personal jurisdiction in California over a Delaware corporation headquartered in New York); *ClearOne, Inc. v. Revolabs, Inc.*, 369 P.3d 1269, 1282–83 (Utah 2016) (applying *Daimler* to reject general personal jurisdiction in Utah over a Delaware corporation); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127–28 (Del. 2016) (applying *Daimler* to a Georgia corporation); *Catholic Diocese of Green Bay, Inc. v. John Doe 119*, 349 P.3d 518, 519–20 (Nev. 2015) (holding that a Wisconsin-based Catholic diocese was not subject to general personal jurisdiction in Nevada under *Daimler*); *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 386–87 (Tenn. 2015) (holding that ratings agencies based in New York and Delaware were not subject to general personal jurisdiction in Tennessee because they are not "at home" there under *Daimler*), *cert. denied*, 136 S. Ct. 2511 (2016); *Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.*, 859 N.W.2d 182, 194–95 (Iowa 2015) (rejecting general personal jurisdiction in Iowa over a New Jersey corporation based on *Daimler*).

Certiorari is necessary in order to eliminate any potential confusion over the applicability of *Daimler* to purely domestic cases. Although the Montana Supreme Court currently stands alone, the Supreme Court of Appeals of West Virginia recently expressed

doubt about whether *Daimler* applies to domestic corporations. *See State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W. Va. 2016). The West Virginia court ultimately did not determine the matter, *see id.* at 333, but the court stated that *Daimler* "involved an unusual fact setting with no connection whatsoever to the United States," *id.* at 329, and it found this "transnational context" to be "significant," *id.* at 333. The West Virginia court thought that the facts of *McGraw*, which all occurred in the United States, created a "setting [that] is unlike those confronted by the United States Supreme Court in *Daimler*, *Helicopteros*, or *Goodyear*," which involved "international considerations." *Ibid.*

B. The Montana Supreme Court Flouted This Court's Opinions

This Court should also grant certiorari because the Montana Supreme Court's attempt to limit this Court's precedents is wrong. Justice Ginsburg's opinions for the Court in both *Goodyear* and *Daimler* were explicit that, in the law of personal jurisdiction, a "foreign" corporation refers to a corporation based *either* in a "sister state" or a "foreign country." *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919) (hyphenation omitted).

Moreover, as this Court has explained, it is *specific* jurisdiction (not general jurisdiction) that takes account of the place where the events in the suit occurred, in order to determine whether the suit arises in the forum. *Daimler*, 134 S. Ct. at 754–55. General jurisdiction, on the other hand, focuses solely on the relationship between the defendant and the forum state, *ibid.*, a relationship to which the Montana Supreme Court paid no serious attention.

Although this Court went on in *Daimler* to discuss the "transnational context" of that case and the "risks to international comity" from an expansive view of personal jurisdiction, 134 S. Ct. at 762–63, the Court addressed those issues in a separate portion of the opinion from the portion that discussed fundamental principles of due process that apply in every case, *id.* at 760–61. As Justice Sotomayor's separate opinion recognized, *Daimler* confirmed that the "at-home" principle "would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State." *Id.* at 773 n.12 (Sotomayor, J., concurring in judgment).

More fundamentally, the Montana Supreme Court's suggestion that transnational facts deserve a different personal-jurisdiction analysis cannot be squared with *International Shoe*—the foundation for *Daimler* and all of modern personal-jurisdiction law—which involved purely domestic parties and events. This Court has applied *International Shoe* in exactly the same way in both transnational cases and when all of the parties and events are American. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The Montana Supreme Court also disregarded the *reasoning* that underlies this Court's holdings. The due-process limitations on personal jurisdiction protect individual liberty by guarding against "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292. The Due Process Clause also "ensure[s] that the States,

through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Ibid.* Both of those concerns apply just as much to domestic cases as to transnational ones, and both apply in full to this case.

Certiorari is necessary to resolve the split and to reinforce that this Court in *Goodyear* and *Daimler* meant what it said: Corporations based in sister-states are not subject to general personal jurisdiction except where they are "at home."

II. Certiorari Is Necessary To Resolve The Split Over Whether FELA Confers General Personal Jurisdiction On State Courts

If the Montana Supreme Court had done nothing more than limit *Daimler* to its facts, then a summary reversal would be the obvious solution. But the Montana Supreme Court also justified its refusal to apply *Daimler*'s due-process standard—and its revival of a "doing business" test for general personal jurisdiction—on the additional ground that *Daimler* "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. In doing so, the Montana Supreme Court exacerbated a split of authority—now 3-2 with Montana in the minority—regarding whether FELA obviates the limitations of the Due Process Clause on state courts' exercise of general personal jurisdiction.

The Montana Supreme Court's holding was clear legal error. Even if the Montana court's statutory analysis were correct—and it is not—*Daimler* is a constitutional holding interpreting the Fourteenth Amendment, which cannot be overridden by a statute. Certiorari is necessary to resolve the split and reaffirm that the Constitution is the supreme law of the land.

A. The Opinion Below Deepened A Split, Now 3-2, On Personal Jurisdiction In FELA Cases

In *Southern Pacific Transportation Co. v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992), the Supreme Court of Mississippi explicitly rejected the conclusion that FELA provides a basis for personal jurisdiction in state court wherever the railroad does business, without the need for a due-process analysis. The Mississippi court held that, although "FELA provides a regime of concurrent federal and state jurisdiction ... this refers to *subject matter* jurisdiction." *Id.* at 362–63 (emphasis added). The Mississippi court further held, contrary to the Montana court here, that "[n]othing in the act addresses the matter of personal jurisdiction in the state court." *Ibid.* The court ordered the FELA case dismissed for lack of personal jurisdiction. *Ibid.*

Similarly, in *Norfolk Southern Railway Co. v. Maynard*, 437 S.E.2d 277, 280–81 (W. Va. 1993), the Supreme Court of Appeals of West Virginia held that, in a FELA case, a state court must first ensure that it has personal jurisdiction over the defendant by applying the due-process standard of *International Shoe*, before turning to FELA. The West Virginia court explained that, "*[i]n addition* to the requirements for *in personam* jurisdiction outlined in *International Shoe* and its progeny," Section 56 imposes *further* limitations on where a FELA action may be brought. *Id.* at 281 (first emphasis added). The court remanded for further factual development on personal jurisdiction. *Id.* at 284.

And in *Hayman v. Southern Pacific Co.*, 278 S.W.2d 749, 751 (Mo. 1955), the Supreme Court of

Missouri rejected the contention that personal jurisdiction could be based on FELA. Contrary to the Montana court here, the Missouri court held that, in any FELA action, the state court "must acquire jurisdiction over the defendant." *Ibid.* (citing *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 3 (1950)). The Missouri court thus applied *International Shoe* and concluded that, even though the defendant was doing business in Missouri, personal jurisdiction was inconsistent with due process. *Id.* at 751–52.

On the other side of the split, the Supreme Court of Alabama has agreed with the Montana Supreme Court that, in a FELA case, it is sufficient for personal jurisdiction that the defendant is doing business in the forum state. *See MacKinnon v. St. Louis S.W. Ry. Co.*, 518 So. 2d 89, 93 (Ala. 1987). The Alabama Supreme Court, like the Montana Supreme Court, misread this Court's decision in *Miles v. Illinois Central Railroad*, 315 U.S. 698 (1942), as a case about personal jurisdiction. 518 So. 2d at 93. In fact, as discussed below, *Miles* has nothing to do with personal jurisdiction.

Certiorari is necessary to resolve this 3-2 split on whether the Due Process Clause, as interpreted by *International Shoe* and *Daimler*, controls in FELA cases filed in state court, or instead whether it is sufficient for personal jurisdiction that the defendant is doing business in the forum. This issue is a matter of live controversy throughout the United States: FELA plaintiffs have invoked the reasoning below in several other state trial courts in an attempt to have those courts assert general personal jurisdiction over railroads wherever they operate.

B. The Opinion Below Is Contrary To This Court's FELA Precedents

The Montana Supreme Court grossly misconstrued this Court's FELA precedents, *see* Pet. App. 6a–9a, 12a–13a, which have never approved personal jurisdiction in every state court where a railroad is doing business. As Justice McKinnon pointed out below, not one of the cases cited by the Montana majority so much as *mentioned* personal jurisdiction. Pet. App. 27a–28a.

In *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284, 285 (1932), the defendants contended that a FELA lawsuit against them in the forum would burden interstate commerce in violation of the Dormant Commerce Clause; they did not object to personal jurisdiction based on the Due Process Clause. This Court sustained the dormant-commerce-clause challenge as to one railroad and rejected it as to another, *id.* at 286–87, but the Court said nothing about personal jurisdiction or due process.

In both *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 47 (1941), and *Miles*, 315 U.S. at 699, this Court considered whether FELA preempted the traditional equitable power of a state court to enjoin lawsuits in neighboring courts on the ground that they are vexatious and harassing. This Court held that Congress had indeed preempted state courts from enjoining FELA cases in both federal court, *Kepner*, 314 U.S. at 53–54, and other state courts, *Miles*, 315 U.S. at 704. But neither opinion discussed personal jurisdiction, much less held that FELA confers general personal jurisdiction on every state court where a railroad operates. Similarly, *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 381 (1953), raised exactly the same question presented as *Miles* based on a later

statutory amendment, and this Court held that the amendment did not change Congress's prohibition on equitable injunctions in FELA cases, *id.* at 387. *Pope* too was not about personal jurisdiction.

The fact that some state courts in these cases apparently exercised jurisdiction over out-of-state defendants does not support the Montana Supreme Court's judgment, because the defendants in these cases may have waived personal jurisdiction. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (personal jurisdiction is a waivable right); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (holding that "drive-by jurisdictional rulings of this sort ... have no precedential effect").

In any event, even if this Court's earlier precedents had tacitly authorized state courts' general personal jurisdiction in FELA cases wherever the railroad is doing business—and they did not—those cases still would not justify the result here. All but *Pope* were decided in the "era" before *International Shoe*, when it sufficed for general personal jurisdiction that the defendant had continuous operations in the forum state. *See Daimler*, 134 S. Ct. at 761 n.18. This Court made clear in *Daimler* that cases from that era "should not attract heavy reliance today." *Ibid.*

In fact, however, this Court's precedents actually *refute* the Montana Supreme Court's holding that FELA confers personal jurisdiction on state courts. This Court has held that FELA is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912). In *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3 (1950), this Court treated it

as a given that a FELA case may be brought only where "the State has acquired jurisdiction over the defendant."

The Montana Supreme Court relied on FELA's Section 56. Pet. App. 6a. That provision states that "[u]nder this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. But that sentence plainly "establishes venue for an action in the federal courts." *Kepner*, 314 U.S. at 52; *see also Pope*, 345 U.S. at 385 (Section 56 provides a "right to establish venue in the federal court"). It has nothing to do with state courts' personal jurisdiction, which is limited by the Fourteenth Amendment as a means of protecting individual liberty and policing the states' "status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

The next sentence of Section 56 provides that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56. The Montana Supreme Court stated that Section 56 "does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction, [and] the U.S. Supreme Court has never given it such an interpretation." Pet. App. 14a. That is plainly wrong. As this Court explained in the *Second Employers' Liability Cases*, Section 56 was drafted to correct the mistaken impression of some state courts that Congress had meant to withdraw *subject-matter* jurisdiction over FELA claims from state courts. 223 U.S.

at 55. Section 56's confirmation of "concurrent" jurisdiction in state courts simply rebuts any argument that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts." *Id.* at 56. That is solely a matter of subject-matter jurisdiction, not personal jurisdiction. Section 56 thus reaffirms that the Constitution grants subject-matter jurisdiction over FELA claims to state courts, but only "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 55.

Indeed, the term "concurrent jurisdiction" *always* refers to the "authority" of a state court "to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also* The Federalist No. 82, p. 555 (J. Cooke ed. 1961) (A. Hamilton) (the Constitution establishes that "the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited"). There are many, many federal statutes that confer "concurrent jurisdiction" on state courts, and those have always been understood to confer subject-matter jurisdiction, never personal jurisdiction. *See, e.g.*, 15 U.S.C. § 3007(c) (Interstate Horseracing Act); 22 U.S.C. § 9003(a) (International Child Abduction Remedies Act); 29 U.S.C. § 1132(e)(1) (ERISA); 42 U.S.C. § 13981(e)(3) (Violence Against Women Act). This Court has never suggested that Congress even has the *power* to affect the personal jurisdiction of state courts.

The Montana Supreme Court simply ignored the fundamental difference between state courts' subject-matter jurisdiction, which can be altered by Congress, and personal jurisdiction, which is governed by state law subject to the Due Process Clause.

Even if the Montana Supreme Court's interpretation of FELA were correct—and it is not, not even close—the Montana Supreme Court refused to respect *Daimler*'s status as a *constitutional* holding. This Court has made clear that it is "[t]he Due Process Clause" that restricts the states' personal jurisdiction, in order to "protect the liberty of the nonresident defendant." *Walden*, 134 S. Ct. at 1121–22. The Montana Supreme Court desired to give FELA a "liberal construction" in favor of injured railroad workers. Pet. App. 5a (citing, *e.g.*, *Urie v. Thompson*, 337 U.S. 163, 180 (1949)); *see also* Pet. App. 14a, 18a. But the construction of FELA makes no difference to the Due Process Clause. "[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

Certiorari is necessary to resolve the split and to clarify that this Court's constitutional holdings cannot be abrogated by statute.

III. This Case Involves Extremely Important Due-Process Protections

This Court's intervention is also necessary to prevent a systematic deprivation of due process in Montana's courts.

If the Montana Supreme Court's decision is allowed to stand, then every domestic company that does any business in Montana (particularly railroads) will potentially be subject to general personal jurisdiction in Montana. Montana trial courts will cite the opinion below and deny motions to dismiss for lack of personal jurisdiction on the ground that *Daimler* is limited to cases with foreign plaintiffs, foreign defendants, and events occurring outside the United States. Moreover, the Montana Supreme Court's exclusion of

FELA cases from the protections of due process will provide a blueprint for courts to exclude other statutory causes of action.

It is also a certainty that, under the decision below, every railroad operating in Montana will be subject to suit in Montana for FELA claims arising across the nation with no connection to the state. BNSF and other railroads will thus be forced to defend cases in Montana when, as here, the site of the injury, the relevant evidence, and the witnesses are all located hundreds of miles away.

To make matters worse, the Montana Supreme Court has repeatedly subjected railroad defendants to plaintiff-friendly procedural rules and substantive FELA standards. For example, the Montana Supreme Court has explicitly disagreed with the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits and extended the statute of limitations for FELA claims longer than any other court. *See Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1259–61 (Mont. 2015), *cert. denied*, 136 S. Ct. 1495 (2016). In combination with *Anderson*, the decision below means that BNSF will not only face out-of-state lawsuits in Montana that should have been tried elsewhere; BNSF will face untimely lawsuits in Montana that should never have been tried at all.

The predictable result of the decision below is rampant forum shopping, an abuse that is already occurring in Montana with alarming frequency. There are currently 32 cases against BNSF pending in Montana state courts brought by FELA plaintiffs who are not Montana residents, who were not injured in Montana, and who do not allege *any* Montana-related acts

or omissions.* And BNSF and other railroads have also been sued in many other states where they are not at home by out-of-state FELA plaintiffs armed with the reasoning below. Unless this Court intervenes, BNSF and other defendants will face hundreds more out-of-state FELA lawsuits, and suffer precisely the "exorbitant exercises of all-purpose jurisdiction" that *Daimler* sought to prohibit. 134 S. Ct. at 761.

* * *

This is not the first time the Montana Supreme Court has defiantly refused to apply a constitutional decision of this Court that it did not like. *See W. Tradition P'ship, Inc. v. Attorney Gen. of Mont.*, 271 P.3d 1 (Mont. 2011). Last time around, this Court summarily reversed. *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

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* *Kingery v. BNSF Ry. Co.*, No. DV 11-1799; *Hoemberg v. BNSF Ry. Co.*, No. DV 12-86; *Cole v. BNSF Ry. Co.*, No. DV 12-88; *Brunelle v. BNSF Ry. Co.*, No. DV 12-862; *Veal v. BNSF Ry. Co.*, No. DV 13-179; *Hagel v. BNSF Ry. Co.*, No. DV 13-180; *Smith v. BNSF Ry. Co.*, No. DV 13-292; *Lopez v. BNSF Ry. Co.*, No. DV 13-332; *Klein v. BNSF Ry. Co.*, No. DV 13-401; *Collins v. BNSF Ry. Co.*, No. DV 13-427; *Ward v. BNSF Ry. Co.*, DV 13-570; *Heim v. BNSF Ry. Co.*, No. DV 13-591; *DeLeon v. BNSF Ry. Co.*, No. DV 13-729; *Vontz v. BNSF Ry. Co.*, No. DV 13-798; *Monroy v. BNSF Ry. Co.*, No. DV 13-799; *Ward v. BNSF Ry. Co.*, No. DV 13-1028; *Linder v. BNSF Ry. Co.*, No. DV 13-1069; *Stevens v. BNSF Ry. Co.*, No. DV 13-1274; *Pfaffle v. BNSF Ry. Co.*, No. DV 13-1388; *Abeyta v. BNSF Ry. Co.*, No. DV 13-1626; *Beck v. BNSF Ry. Co.*, No. DV 14-167; *Cox v. BNSF Ry. Co.*, No. DV 14-360; *Hoskins v. BNSF Ry. Co.*, No. DV 14-361; *Molder v. BNSF Ry. Co.*, No. DV 14-568; *McNutt v. BNSF Ry. Co.*, No. 14-1089; *Rohr v. BNSF Ry. Co.*, No. DV 14-1219; *Humphries v. BNSF Ry. Co.*, No. DV 14-1345; *Shute v. BNSF Ry. Co.*, No. DV 15-280; *Truelove v. BNSF Ry. Co.*, No. 15-281; *Gobin v. BNSF Ry. Co.*, No. ADV 15-723; *Puuri v. BNSF Ry. Co.*, No. DV 16-565; *Mitchell v. BNSF Ry. Co.*, No. DV 16-1161.

Although summary reversal would be appropriate here, the Court may prefer to grant certiorari in order to resolve the FELA-related split and to clarify that a statute may not override the Due Process Clause.

General personal jurisdiction is not a novel or difficult issue; the opinion in *Goodyear* was unanimous, and eight Justices joined the Court's opinion in *Daimler*. The judgment below depends on the Montana Supreme Court's astounding contention that *Daimler*'s constitutional rule does not apply to domestic railroads doing business in Montana. But "[t]here can be no serious doubt that it does." *American Tradition*, 132 S. Ct. at 2491 (citing U.S. Const. art. VI, cl. 2). The Montana Supreme Court must not be allowed to ignore this Court's decisions and deny due process to out-of-state defendants in Montana's courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 28, 2016

APPENDIX

APPENDIX A

DA 14-0825

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2016 MT 126

KELLI TYRRELL, as Special Administrator
for the Estate of BRENT T. TYRRELL (deceased),
Plaintiff and Appellee,

v.

BNSF RAILWAY CO., a Delaware corporation,
Defendant and Appellant.

ROBERT M. NELSON,

Plaintiff and Appellant,

v.

BNSF RAILWAY CO.,
a Delaware corporation,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and For the County of Yellowstone, Cause Nos. DV 14-0699 and DV 11-417
Honorable Michael G. Moses and
G. Todd Baugh, Presiding Judges

* * *

Argued and Submitted: December 9, 2015
Decided: May 31, 2016

Filed: s/
Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 The plaintiffs in these consolidated appeals, Robert Nelson and Kelli Tyrrell (Tyrrell), as Special Administrator of the Estate of Brent Tyrrell (Brent), pled violations of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 through 60, for injuries allegedly sustained while Nelson and Brent were employed by BNSF Railway Company in states other than Montana. Both actions were brought in the Thirteenth Judicial District Court, Yellowstone County. BNSF moved to dismiss both plaintiffs' claims for lack of personal jurisdiction. Judge Michael G. Moses, presiding over Tyrrell's action, denied BNSF's motion to dismiss. Judge G. Todd Baugh, presiding over Nelson's action, granted BNSF's motion to dismiss. BNSF appeals Judge Moses' order, and Nelson appeals Judge Baugh's order. The issues on appeal are:

1. *Whether Montana courts have personal jurisdiction over BNSF under the FELA.*

2. *Whether Montana courts have personal jurisdiction over BNSF under Montana law.*

¶2 We hold that Montana courts have general personal jurisdiction over BNSF under the FELA and Montana law. We affirm Judge Moses' order denying BNSF's motion to dismiss Tyrrell's complaint. We reverse Judge Baugh's order granting BNSF's motion to

dismiss Nelson's complaint. We remand both cases for further proceedings consistent with this Opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 In March 2011, Nelson, a North Dakota resident, sued BNSF to recover damages for knee injuries he allegedly sustained while employed by BNSF as a fuel truck driver. BNSF is a Delaware corporation, and its principal place of business is Texas. Nelson's complaint did not allege that Nelson ever worked in Montana or was injured in Montana.

¶4 BNSF filed a M. R. Civ. P. 12(b)(2) motion to dismiss Nelson's complaint for lack of personal jurisdiction. Judge Baugh granted BNSF's motion, stating: "I believe 3 Judges in this District have faced similar Motions which they have denied based on applicable precedent. Their rulings seem sound but do not look at whether based on common sense it may be time to reassess FELA cases in Montana which have no forum related connection." Judge Baugh then relied upon a recent United States Supreme Court decision, *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746 (2014) (discussed in our resolution of Issue 1), to hold that BNSF's "due process rights prevent this Court from exercising general all-purpose jurisdiction over [BNSF] and this Court does not have specific jurisdiction." Nelson appeals Judge Baugh's order granting BNSF's motion to dismiss.

¶5 In May 2014, Tyrrell sued BNSF for injuries Brent allegedly sustained during the course of his employment with BNSF. The complaint alleged that, while working for BNSF, Brent was exposed to various carcinogenic chemicals that caused him to develop kidney cancer and ultimately led to his death. The

complaint did not allege that Brent ever worked for BNSF in Montana or that any of the alleged chemical exposures occurred in Montana.

¶6 BNSF filed a M. R. Civ. P. 12(b)(2) motion to dismiss Tyrrell's complaint for lack of personal jurisdiction. Judge Moses denied BNSF's motion. He adopted and incorporated Montana Thirteenth Judicial District Court, Yellowstone County Judge Gregory R. Todd's ruling on BNSF's M. R. Civ. P. 12(b)(2) motion to dismiss in *Jesse R. Monroy v. BNSF Ry. Co.*, Cause No. DV 13-799 (Aug. 1, 2014). In *Monroy*, Judge Todd found:

> BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years. . . . In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum. . . . In the last year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development.[1]

Judge Todd analyzed Montana and United States Supreme Court precedent interpreting the FELA. He concluded that, under Montana's long-arm statute, M. R. Civ. P. 4(b)(1), BNSF "does meet the criteria of

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[1] BNSF has not disputed any of these facts.

being found within Montana and having substantial, continuous and systematic activities within Montana for general jurisdiction purposes." BNSF appeals Judge Moses' order denying BNSF's motion to dismiss, which adopted and incorporated Judge Todd's analysis in *Monroy*.

STANDARD OF REVIEW

¶7 "The existence of personal jurisdiction is a question of law, which we review de novo." *Tackett v. Duncan*, 2014 MT 253, ¶ 16, 376 Mont. 348, 334 P.3d 920.

DISCUSSION

¶8 *1. Whether Montana courts have personal jurisdiction over BNSF under the FELA.*

¶9 Congress enacted the FELA in 1908. The Act was "an avowed departure from the rules of common law," in response to "the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 329, 78 S. Ct. 758, 762 (1958). In keeping with Congressional intent, "[t]he United States Supreme Court has repeatedly noted that the FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes." *Labella v. Burlington N.*, 182 Mont. 202, 205, 595 P.2d 1184, 1186 (1979) (citing *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949); *Coray v. S. Pac. Co.*, 335 U.S. 520, 69 S. Ct. 275 (1949); *McGovern v. Phila. & Reading R.R.*, 235 U.S. 389, 35 S. Ct. 127 (1914)).

¶10 When the FELA was initially enacted, "venue of actions under it was left to the general venue statute, 35 Stat. 65, which fixed the venue of suits in the United States courts, based in whole or in part upon the [FELA], in districts of which the defendant was an inhabitant." *Balt. & Ohio. R.R. Co. v. Kepner*, 314 U.S. 44, 49, 62 S. Ct. 6, 8 (1941) (citation omitted). However, "[l]itigation promptly disclosed what Congress considered deficiencies in such a limitation of the right of railroad employees to bring personal injury actions." *Kepner*, 314 U.S. at 49, 62 S. Ct. at 8 (citations omitted). Thus, in 1910, Congress added the following language to Section 6 of the FELA, 45 U.S.C. § 56:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

See Kepner, 314 U.S. at 49, 62 S. Ct. at 8 (citing Act of Apr. 5, 1910, Pub. L. No. 61-117, ch. 143, 36 Stat. 291).

¶11 This language was added to rectify "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their homes." *Kepner*, 314 U.S. at 50, 62 S. Ct. at 8. The amendment was

"deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill [to amend the FELA], 'to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.'" *Kepner*, 314 U.S. at 50, 62 S. Ct. at 8 (quoting 45 Cong. Rec. 4034 (1910) (statement of Sen. William Borah)). In *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 702, 62 S. Ct. 827, 829 (1942), the U.S. Supreme Court explained:

> The specific declaration in [45 U.S.C. § 56] that the United States courts should have concurrent jurisdiction with those of the several states, and the prohibition against removal, point clearly to the conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant . . . actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.

Justice Jackson, concurring, further noted:

> Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-

> denying or large-hearted manner. There is nothing to restrain use of that privilege . . . .

Miles, 315 U.S. at 706-07, 62 S. Ct. at 832 (Jackson, J., concurring).

¶12 The U.S. Supreme Court consistently has interpreted 45 U.S.C. § 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state. *E.g.*, *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 73 S. Ct. 749 (1953); *Miles*, 315 U.S. 698, 62 S. Ct. 827. For example, in *Pope*, a plaintiff who resided and was injured in Georgia filed a FELA action against his railroad employer, a Virginia corporation, in Alabama state court. The plaintiff grounded jurisdiction and venue on 45 U.S.C. § 56. The railroad requested an injunction from a Georgia state court pursuant to a Georgia statute providing Georgia courts with the power to enjoin Georgia residents from bringing suits in a foreign jurisdiction. The Georgia Supreme Court ruled in favor of the railroad. The U.S. Supreme Court reversed, holding that 45 U.S.C. § 56 "establishes a petitioner's right to sue in Alabama. It provides that the employee may bring his suit wherever the carrier 'shall be doing business,' and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory cause of action . . . ." *Pope*, 345 U.S. at 383, 73 S. Ct. at 751.

¶13 Similarly, in *Miles*, 315 U.S. 698, 62 S. Ct. 827, a Tennessee resident was killed while working for his railroad employer in Tennessee. The railroad was an Illinois corporation. The employee's estate brought suit against the railroad in Missouri. The Tennessee

Court of Appeals, at the railroad's request, permanently enjoined the employee's estate from prosecuting his claim in Missouri. The U.S. Supreme Court reversed, holding:

> Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant . . . actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.

Miles, 315 U.S. at 702, 62 S. Ct. at 829.

¶14 BNSF contends that *Daimler*, ___ U.S. ___, 134 S. Ct. 746, overruled prior U.S. Supreme Court precedent holding the FELA conferred jurisdiction to state courts where the railroad does business. In *Daimler*, Argentinian plaintiffs filed suit in California Federal District Court against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company headquartered in Stuttgart that manufactured Mercedes-Benz vehicles in Germany. The complaint alleged that, during Argentina's "Dirty War" from 1976-1983, Daimler's Argentinian subsidiary, Mercedes-Benz Argentina, collaborated with Argentinian security forces to kidnap, detain, torture, and kill Mercedes-Benz Argentina workers. The plaintiffs sought damages for the alleged human rights violations from Daimler under the laws of the United States, California, and Argentina. They predicated jurisdiction over the lawsuit on the California con-

tacts of Mercedes-Benz USA, LLC, an indirect subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey.

¶15 The U.S. Supreme Court granted certiorari "to decide whether, consistent with the Due Process Clause of the Fourteenth amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and occurring entirely abroad." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 753. The Court emphasized that "general jurisdiction requires affiliations so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State." *Daimler*, ___ U.S at ___ n.11, 134 S. Ct. at 758 n.11 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011)) (internal quotation marks omitted and changes in original). The Court rejected the plaintiffs' "general or all-purpose" theory of jurisdiction, under which Daimler could be sued "on any and all claims against it, wherever in the world the claims may arise." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 751. The Court determined that such "exorbitant" exercises of personal jurisdiction are "barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 751. The Court emphasized that "no part of [Mercedes-Benz] Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States" and rejected the plaintiffs' attempt to found jurisdiction over Daimler on the California contacts of Mercedes-Benz USA. *Daimler*, ___ U.S. at ___, 134 S. Ct. at 752, 760. In doing so, the Court noted that Mercedes-Benz USA's relationship with Daimler was that of an independent

contractor, and it had no authority to make binding obligations or act on behalf of Daimler. *Daimler*, ___ U.S. at ___, 134 S. Ct. at 752.

¶16 *Daimler* addressed "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 750. Unlike the cases before us, *Daimler* did not involve a FELA claim or a railroad defendant. Likewise, none of the cases BNSF cites to support its position that *Daimler* precludes state court jurisdiction over FELA claims against railroads involved FELA claims or railroad defendants.[2] In *Daimler*, the U.S. Supreme Court did not address personal jurisdiction under the FELA, nor did it need to: the Court has long held that the FELA does not apply to torts that occur in foreign countries, even when all parties involved are citizens of the United States. *See N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31, 45 S. Ct. 402, 402 (1925); *accord Cox v. Chesapeake Ohio R.R. Co.*, 494 F.2d 349, 350 (6th Cir. 1974) (noting that *Chisholm* is "a firm restriction on the extra territorial application" of the FELA and that "the Supreme Court apparently added to this resolve in *Lauritzen v. Larsen*, [345 U.S. 571, 581, 73 S. Ct. 921, 927 (1953)], wherein it stated that, 'we have held [the FELA] not applicable to an American citizen's injury sustained in Canada while in service of an American employer'").

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[2] In its opening brief, BNSF cites to *BNSF Ry. Co. v. Superior Court*, 235 Cal. App. 4th 591 (Cal. Ct. App. 2015). This case was rendered nonciteable pending review by the California Supreme Court in *BNSF Ry. Co. v. Superior Court*, 352 P.3d 417 (Cal. 2015); therefore, it has no persuasive value.

¶17 Moreover, *Daimler* did not present novel law. Rather, the U.S. Supreme Court emphasized prior holdings that general jurisdiction requires foreign corporations to have affiliations so "continuous and systematic" as to render them "at home" in the forum state. *Daimler*, ___ U.S. at ___, 134 S. Ct. at 749 (citing *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851). Congress drafted the FELA to make a railroad "at home" for jurisdictional purposes wherever it is "doing business." *See Kepner*, 314 U.S. at 49-50, 62 S. Ct. at 8 (citing 45 Cong. Rec. at 4034). Therefore, *Daimler* did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is "doing business."

¶18 The U.S. Supreme Court's decision in *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 52 S. Ct. 152 (1932), provides further guidance on whether BNSF is subject to suit under the FELA by way of "doing business" in Montana. In *Terte*, the U.S. Supreme Court addressed whether a Missouri state court could entertain a FELA suit against two different railroad companies—the Denver and Rio Grande Western Railroad Company (Rio Grande) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe). The railroad employee sought damages for injuries sustained in Colorado by the railroad companies' joint negligence. The U.S. Supreme Court addressed the personal jurisdiction of the Missouri court over the two railroads, respectively. The Court held that the Rio Grande could not be sued in Missouri, because:

> The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado,

> Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic. It is not licensed to do business in Missouri.

Terte, 284 U.S. at 286, 52 S. Ct. at 153. By contrast, the U.S. Supreme Court held that "the Santa Fe was properly sued" in Missouri, relying on the following facts:

> The Santa Fe, a Kansas corporation, owns and operates railroad lines in Missouri, Kansas, Colorado, and other States. It is licensed to do business in Missouri and has an office and agents in Jackson County[, Missouri]. These agents transact the business ordinarily connected with the operation of a carrier by railroad.

Terte, 284 U.S. at 286, 52 S. Ct. at 153.

¶19 It is undisputed that BNSF owns and operates railroad lines in Montana. BNSF is licensed to do business and has offices and agents in Montana. BNSF's agents in Montana transact business ordinarily connected with the operation of a railroad carrier. Thus, under the U.S. Supreme Court's reasoning in *Terte*, BNSF is "properly sued" in Montana. *See Terte*, 284 U.S. at 287-88, 52 S. Ct. at 153. BNSF is "doing business" in Montana, and Montana courts have general personal jurisdiction over BNSF under 45 U.S.C. § 56.

¶20 This conclusion is in line with the U.S. Supreme Court's "liberal construction" of the FELA in favor of injured railroad workers. *See Urie*, 337 U.S. at 180, 69 S. Ct. at 1030. 45 U.S.C. § 56 does not specify whether the "concurrent jurisdiction" conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction, the U.S. Supreme Court has never given it such an interpretation, and it is not the province of this Court to insert such a limitation. *See* § 1-2-101, MCA ("In the construction of a statute, the office of the judge is . . . not to insert what has been omitted . . . .").

¶21 Moreover, as BNSF's counsel acknowledged at oral argument, BNSF's interpretation of 45 U.S.C. § 56 would mean that a Montana resident, hired and employed by BNSF in Montana, who was injured while working—even temporarily—for BNSF in another state, would not be able to bring his action in the state in which he regularly resides and where his employer regularly conducts business. Such a result is in direct contravention of the FELA's purpose of protecting injured railroad workers from what the U.S. Supreme Court characterized as the "injustice" of having to travel far from home to bring suit against the railroad. *See Kepner*, 314 U.S. at 49-50, 62 S. Ct. at 8. And if Montana residents may sue BNSF in a Montana state court for injuries that occur outside of Montana, so may residents of other states. *See Miles*, 315 U.S. at 704, 62 S. Ct. at 830 ("To deny citizens from other states, suitors under [the FELA], access to [Missouri's] courts would, if [Missouri] permitted access to its own citizens, violate the Privileges and Immunities Clause.") (citing U.S. Const. art. IV, § 2).

¶22 Relying on a case that is factually and legally distinguishable, BNSF asks us to depart from the language of 45 U.S.C. § 56—and from a century of U.S. Supreme Court precedent interpreting it—to conclude that the FELA no longer provides Montana courts with jurisdiction over cases in which the plaintiff was injured outside of Montana. We decline to do so. BNSF does business in Montana; therefore, under the FELA, Montana courts have general personal jurisdiction over BNSF.

¶23 *2. Whether Montana courts have personal jurisdiction over BNSF under Montana law.*

¶24 The FELA does not require states to entertain suits arising under it; rather it empowers them to do so where local law permits. *See Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 388, 49 S. Ct. 355, 356 (1929) ("[T]here is nothing in the Act of Congress that purports to force a duty upon [State] Courts as against an otherwise valid excuse.") (citation omitted); *Mondou v. N.Y., New Haven & Hartford R.R. Co.* (*Second Employers' Liab. Cases*), 223 U.S. 1, 59, 32 S. Ct. 169, 179 (1912) ("[R]ights arising under [the FELA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."). However, "the Federal Constitution prohibits state courts of general jurisdiction from refusing to [enforce the FELA] solely because the suit is brought under a federal law." *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34, 54 S. Ct. 690, 692 (1934). *See also Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 364-65, 72 S. Ct. 312, 316 ("[N]o State which gives its courts jurisdiction over common law actions for negligence may deny access to its courts for

a negligence action founded on the [FELA]."). Further, the existence of jurisdiction "creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Mondou*, 223 U.S. at 58, 32 S. Ct. at 178.

¶25 Montana courts conduct a two-step inquiry to determine whether the exercise of personal jurisdiction over a nonresident defendant is appropriate. *Edsall Constr. Co. v. Robinson*, 246 Mont. 378, 381, 804 P.2d 1039, 1041 (1991). First, we determine whether jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1). If it does, we next determine "whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice embodied in the due process clause." *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83, 796 P.2d 189, 193 (1990).

¶26 Personal jurisdiction can be either general or specific. Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation, . . . and depends on whether the defendant's suit-related conduct created a substantial connection with the forum state." *Tackett*, ¶ 19 (citations and internal quotation marks omitted). Conversely, general jurisdiction exists over "[a]ll persons found within the state of Montana." M. R. Civ. P. 4(b)(1). A nonresident defendant that maintains "substantial" or "continuous and systematic" contacts with Montana is "found within" the state and may be subject to Montana's jurisdiction, even if the cause of action is unrelated to the defendant's activities within Montana. *Tackett*, ¶ 20 (quoting *Simmons Oil Corp.*, 244 Mont. at 83, 796 P.2d at 194).

¶27 BNSF does not dispute that it conducts business in Montana by operating trains and maintaining traffic offices. According to BNSF, it has over 2,000 miles of railroad track and more than 2,000 employees in Montana. BNSF maintains facilities in Montana, owns real estate in Montana, has a telephone listing in Montana, and does direct advertising in Montana with Montana media. Each of these factors is significant in determining whether general jurisdiction over BNSF exists. *See Bedrejo v. Triple E Can., Ltd.*, 1999 MT 200, ¶¶ 8, 12, 295 Mont. 430, 984 P.2d 739. Though BNSF alleges that its revenues from Montana represent less than ten percent of its nationwide business, that fact alone does not defeat personal jurisdiction. *See Reed v. Am. Airlines*, 197 Mont. 34, 36, 640 P.2d 912, 914 (1982) (holding that a nonresident corporation's activities "must comprise a significant component of the company's business, although the percentage as related to total business may be small" for personal jurisdiction purposes). Judge Baugh, though he granted BNSF's motion to dismiss, recognized that BNSF "has way more than minimum contacts with the State of Montana. It is a significant, substantial, continuous and systematic business enterprise in Montana even though its operations in some of the 27 other states it operates in are far greater." With that aspect of Judge Baugh's opinion, we agree: BNSF maintains substantial, continuous, and systematic contacts with Montana. Thus, BNSF is "found within" the state under M. R. Civ. P. 4(b)(1). *See Tackett*, ¶ 20.

¶28 Given that personal jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1), we next determine whether exercising personal jurisdiction over BNSF comports

with the due process clause. *Simmons Oil Corp.*, 244 Mont. at 82-83, 796 P.2d at 193. BNSF's contention that it is not subject to personal jurisdiction in Montana courts is largely based on its incorrect interpretation of *Daimler*, discussed in our resolution of Issue 1. In contrast to BNSF's position, we have held that "[t]he District Courts of Montana clearly have jurisdiction" to hear FELA cases. *Labella*, 182 Mont. at 204, 595 P.2d at 1186. We also have followed federal case law in giving the FELA a liberal construction to accomplish its humanitarian and remedial purposes. *Davis v. Union Pac. R.R.*, 282 Mont. 233, 245, 937 P.2d 27, 34 (1997). This is especially true regarding a plaintiff's forum selection under the FELA, *Davis*, 282 Mont. at 245-46, 937 P.2d at 34, "even if that choice of forum involves forum shopping," *State ex rel. Burlington N. R.R. v. District Court*, 270 Mont. 146, ___, 891 P.2d 493, 499 (1995) (rejecting BNSF's motion to dismiss an out-of-state FELA plaintiff's claim notwithstanding the doctrine of forum non conveniens and § 25-2-201, MCA).

¶29 Our own precedent on this issue is consistently clear and consonant with the U.S. Supreme Court's interpretation of 45 U.S.C. § 56. In *Labella*, 182 Mont. at 207, 595 P.2d at 1187, we explained:

> The policy of the State of Montana is clearly announced in the State Constitution. 'Courts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character.' 1972 Mont. Const., Art. II, § 16. This constitutional right is unrestricted by reference to residence or citizenship. Indeed, such qualification could not

pass muster under the Privileges and Immunities Clause of Art. IV, § 2 of the United States Constitution.

If Montana courts have personal jurisdiction over BNSF for FELA cases brought by Montana residents, Montana courts necessarily must have personal jurisdiction over BNSF for FELA cases brought by nonresidents.

¶30 Under Montana law, Montana courts have general personal jurisdiction over BNSF.[3]

CONCLUSION

¶31 Montana courts have general personal jurisdiction over BNSF under the FELA and Montana law. We therefore affirm Judge Moses' order denying BNSF's motion to dismiss Tyrrell's complaint, and we reverse Judge Baugh's order granting BNSF's motion to dismiss Nelson's complaint. We remand both cases for further proceedings consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ PATRICIA COTTER
/S/ BETH BAKER
/S/ MICHAEL E WHEAT
/S/ JIM RICE

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[3] Because we resolve the consolidated appeals on this issue, we need not address the plaintiffs' contention that BNSF consented to personal jurisdiction.

Justice Laurie McKinnon, dissenting.

¶32 I respectfully dissent from the Court's opinion. I would conclude that the District Courts lack general (all-purpose) personal jurisdiction over BNSF in the consolidated appeals under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has made clear twice within the last five years that a state court may assert general jurisdiction over a foreign corporation under the Due Process Clause of the Fourteenth Amendment "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render it essentially at home in the forum State.'" *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011)) (brackets omitted). The United States Supreme Court has made it equally clear that merely "engag[ing] in a substantial, continuous, and systematic course of business" with the forum State is insufficient standing alone to subject a defendant to general jurisdiction. *Daimler*, 134 S. Ct. at 761. Such a formulation, the Supreme Court has explained, would be "unacceptably grasping." *Daimler*, 134 S. Ct. at 761.

¶33 Disregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler*, this Court entirely rejects the "at home" standard in favor of substantially the same formulation that the Supreme Court rejected. Despite the United States Supreme Court's conclusion that permitting general jurisdiction wherever a nonresident defendant is engaging in a substantial, continuous, and systematic course of business would deprive the defendant due

process of law, this Court holds that BNSF can be haled into Montana state courts under the "doing business" standard. The reasons that this Court gives for disregarding the Supreme Court's "at home" formulation and adopting the "doing business" standard are, in my view, unpersuasive. This case is quite clearly controlled by the United States Supreme Court's holdings in *Goodyear* and *Daimler* and the "at home" standard set forth therein.

I.

¶34 The Court does not contend, nor could it seriously contend, that the plaintiffs are able to satisfy the "at home" standard enunciated by the United States Supreme Court in *Goodyear* and in *Daimler*. In *Goodyear*, decided in 2011, the Supreme Court held that under the Due Process Clause a "court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851. In the wake of *Goodyear*, many legal commentators—who had come to believe that general jurisdiction could be exercised wherever a corporation engaged in continuous and systematic business—openly questioned whether the Supreme Court actually intended to impose such a stringent standard for general jurisdiction under the Due Process Clause. *See, e.g.*, Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 Geo. Wash. L. Rev. 202, 214-15, 217 (2011) (contending that the Court's restriction of general jurisdiction to corporations that are "essentially at home" should be dismissed as "loose language").

¶35 In *Daimler*, decided three years later, the Court reaffirmed its holding in *Goodyear* and expanded upon its earlier analysis. In *Daimler*, the plaintiffs brought suit in California federal court against the German corporation Daimler, the manufacturer of Mercedes-Benz automobiles, seeking damages under federal statutory law on the theory that Daimler unlawfully aided the commission of horrific human rights violations against them in Argentina. The plaintiffs maintained that the federal court could exercise general jurisdiction over Daimler because of the "substantial, continuous, and systematic" contacts in California of Daimler's wholly owned subsidiary, Mercedes-Benz USA, who operates "multiple California-based facilities" and is "the largest supplier of luxury vehicles to the California market." *Daimler*, 134 S. Ct. at 752.

¶36 The Court assumed, for purposes of its personal jurisdiction analysis, that Mercedes-Benz USA's contacts were fully imputable to Daimler. Still, even with the contacts of Mercedes-Benz fully attributable to Daimler, the Court rejected the contention that Daimler was subject to general jurisdiction in California. The Court held that the standard of "substantial, continuous, and systematic course of business" was "unacceptably grasping" and "exorbitant," explaining that the Due Process Clause imposes a more stringent standard for state courts attempting to exercise general jurisdiction. *Daimler*, 134 S. Ct. at 761. The Court explained that the proper inquiry for purposes of general jurisdiction "is *not* whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,'" but rather "whether that corporation's affiliations with the State

are *so* 'continuous and systematic' as to *render it essentially at home* in the forum State." *Daimler*, 134 S. Ct. at 752 (quoting *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851) (brackets and internal quotation marks omitted) (emphasis added). A corporation is "essentially at home," the Court instructed, where it is incorporated or where it has its principal place of business. *Daimler*, 134 S. Ct. at 760. The Court explained that only in an "exceptional case" will a corporation be deemed essentially at home in another State. *Daimler*, 134 S. Ct. at 761 n.19.

¶37 Here, there is no dispute that BNSF's affiliations with Montana are not so substantial as to render it essentially "at home" in this State. BNSF is not incorporated under the laws of Montana, nor does it have its principal place of business in Montana. These two facts alone are strong evidence that BNSF is not at home in Montana. "With respect to a corporation, the place of incorporation and principal place of business are 'paradigm bases for general jurisdiction.'" *Daimler*, 134 S. Ct. at 760 (brackets, ellipsis, and citation omitted). "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Daimler*, 134 S. Ct. at 760. It is only in an "exceptional case" that a State will have general jurisdiction over a corporation outside of its place of incorporation and principal place of business. *Daimler*, 134 S. Ct. at 761 n.19.

¶38 There is nothing exceptional about BNSF's contacts with Montana that would permit general jurisdiction. While BNSF certainly conducts substantial business in Montana, "the general jurisdiction inquiry

does not 'focus solely on the magnitude of the defendant's in-state contacts.'" *Daimler*, 134 S. Ct. at 762 n.20 (brackets and citation omitted). Indeed, in *Daimler*, the Court refused to find personal jurisdiction despite the fact that Mercedes-Benz USA distributes tens of thousands of cars to California, generates billions of dollars in revenue from California, and has multiple facilities in the State, including a regional headquarters. *Daimler*, 134 S. Ct. at 752.[1] "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Daimler*, 134 S. Ct. at 762 n.20. "A corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20.

¶39 Applying the United States Supreme Court's directive and comparing BNSF's activities in Montana with its nationwide activities, it is clear that BNSF is not at home in Montana. BNSF receives less than 10% of its revenue from Montana; barely 6% of BNSF's total track mileage is located in Montana; and less than 5% of BNSF's total workforce is located in Montana. These percentages, though slightly greater, differ little from those the Court found to be insufficient in *Daimler*. *See Daimler*, 134 S. Ct. at 752 (noting Mercedes Benz USA's sales make up 2.4% of Daimler's worldwide sales).

¶40 In *Daimler*, the Court cited *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, as the "textbook" example of an "exceptional case"

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[1] *See also Daimler*, 134 S. Ct. at 763 (Sotomayor, J., concurring).

where general jurisdiction may exist outside the corporation's place of incorporation and principal place of business. In *Perkins*, the defendant company's primary place of business was, because of wartime circumstances, temporarily located in Ohio, where the company was sued. *Perkins*, 342 U.S. 437, 447-48, 72 S. Ct. at 419-20. The Court deemed the place of service in those unusual circumstances "a surrogate for the place of incorporation or head office." *Daimler*, 134 S. Ct. at 756 n.8 (citations omitted). On that basis alone, the Court concluded that Ohio courts could exercise general jurisdiction over the company without offending due process. *Daimler*, 134 S. Ct. at 756. In contrast, BNSF's contacts with Montana are far from establishing a surrogate principal place of business in this State.

¶41 In short, BNSF's contacts with Montana are insufficient to satisfy the due process standard set forth by *Goodyear* and *Daimler* to permit BNSF to be haled into courts of this State. That much is not in dispute. And, in my view, that is where the analysis of this case should come to end.

II.

¶42 Acknowledging that BNSF is not "at home" in Montana, the Court persists that BNSF can be brought before tribunals of this State under a less stringent standard, holding that BNSF need only be "doing business" in Montana for state district courts to sustain general jurisdiction. Opinion, ¶ 12. The Court reasons that the Due Process Clause demands less in this case than in *Goodyear* and in *Daimler* because, unlike in those cases, this case involves a

"FELA claim [and] a railroad defendant." Opinion, ¶ 16.

¶43 I must disagree with the Court's refusal to apply the teachings of *Goodyear* and *Daimler*. Flowing from the Due Process Clause, the requirement that a state court have personal jurisdiction is "first of all an individual right" under the Fourteenth Amendment. *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2105 (1982). "It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702, 102 S. Ct. at 2104. That is to say, personal jurisdiction imposes a limitation on a state court's power to "protect the liberty of the nonresident defendant." *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 1122 (2014).

¶44 I perceive no sound basis to afford BNSF less constitutional protection than the defendants were afforded in *Goodyear* and in *Daimler*. The United States Supreme Court has consistently explained that the inquiry under personal jurisdiction does not focus on the unilateral actions of the plaintiff, but instead focuses on the defendant's relationship with the forum State. *Walden*, 134 S. Ct. at 1122 (citing *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1984)). Indeed, there is no authority for the proposition that the quality or quantity of process afforded a defendant by the requirement of general jurisdiction depends on the type of cause of action pursued by the plaintiff or the occupation of the defendant. A defendant does not forfeit liberty or have a diminished liberty interest merely because the plaintiff brings a FELA action. Nor does a

defendant forfeit constitutional protection by operating a railroad. It is thus altogether immaterial under the general jurisdiction inquiry that the plaintiffs here brought a FELA claim rather than a Torture Victim Protection claim (*Daimler*) or a negligence claim (*Goodyear*). It is likewise wholly immaterial that BNSF operates a railroad as opposed to a car dealership (*Daimler*) or a tire manufacturing operation (*Goodyear*). The Due Process Clause requires a defendant to be "at home" to be subject to general jurisdiction in the forum State, *Daimler*, 134 S. Ct. at 754, and the Supreme Court has defined "at home" for a corporation as "the place of incorporation" and the "principal place of business" of the corporation. *Daimler*, 134 S. Ct. at 760. In so doing, the Court has established the minimum, base-line guarantee of due process that must be afforded defendants by the Constitution of the United States. BNSF should not be haled into a state court in Montana under any less stringent of a standard. Simply put, there is not a different, less protective Due Process Clause for BNSF; it is entitled to the same due process of law as every other defendant.

¶45 The Court persists that a "century" of United States Supreme Court precedent dictates otherwise, Opinion, ¶ 22, reasoning that "decades of consistent" Supreme Court decisions show that a nonresident railroad is subject to general jurisdiction wherever the railroad is "doing business." Opinion, ¶ 17. Remarkably, the Court arrives at this conclusion *without citing a single* general jurisdiction case. The Court instead cites three United States Supreme Court decisions—*Pope, Miles*, and *Terte*—having nothing to do with general jurisdiction under the Due Process

Clause. In *Pope* and in *Miles*, the Supreme Court addressed whether FELA prevented state courts from using their equitable powers to enjoin their residents from bringing vexatious suits in other state courts. *Pope*, 345 U.S. at 380, 73 S. Ct. at 750; *Miles*, 315 U.S. at 699, 62 S. Ct. at 828. In *Terte*, the Court addressed whether interstate commerce is unduly burdened by bringing an action under FELA in respect to an injury sustained in another State. *Terte*, 284 U.S. at 287, 52 S. Ct. at 153. These cases do not so much as mention the Due Process Clause or general jurisdiction. Nor have the cases ever been cited by the United States Supreme Court or any other court—until now—for any proposition remotely related to general jurisdiction. This claimed "century" of United States Supreme Court precedent permitting general jurisdiction wherever a nonresident railroad is doing business simply does not exist.

¶46 Further, even if the cases cited by the Court actually stood for the propositions cited for, it would not matter. Notwithstanding the Court's statement that these cases show "decades of consistent" precedent, none of the cited cases were decided within the last six decades. In *Daimler*, the plaintiffs emphasized earlier Supreme Court decisions that seemingly upheld general jurisdiction under a formulation less stringent than the "at home" standard. The Supreme Court, however, refused to follow these decisions, explaining that they were decided in a different "era" before modern general jurisdiction developed. *Daimler*, 134 S. Ct. at 761 n.18. After dismissing the decisions in a footnote, the Court made clear once again that the proper inquiry under the Due Process Clause is whether a nonresident corporation's contacts are so

constant and pervasive as to render it "essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761. Thus, whatever standard earlier decisions may or may not have used, the Supreme Court has now made clear that the Due Process Clause of the Fourteenth Amendment requires a defendant to be "at home" in the forum State to be subject to general jurisdiction.

¶47 Lastly, the Court contends that Congress, *not* the Constitution, controls the sufficiency of process that is required to hale BNSF into state courts in Montana. Pushing aside the constitutional restrictions imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Court maintains that Congress has conferred general jurisdiction under 45 U.S.C. § 56 of FELA, to state courts and has chosen to provide BNSF with less protection than the United States Supreme Court has held is required by the Due Process Clause.

¶48 I again must disagree with the Court. Congress did not, nor could it, do so. First, Congress did not confer personal jurisdiction with the passage of 45 U.S.C. § 56. Section 56 is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts. The United States Supreme Court has made this point clear: 45 U.S.C. § "[5]6 establishes *venue* for an action in the *federal* courts." *Balt. & O. R. Co. v. Kepner*, 314 U.S. 44, 52, 62 S. Ct. 6, 9 (1941) (emphasis added). Indeed, the "phrasing of the section is not unique: it follows the familiar pattern generally employed by Congress in framing venue provisions." *Kepner*, 314 U.S. at 56, 62 S. Ct. at 11 (Frankfurter, J., dissenting) (citing several federal venue statutes). Notably, even the cases the Court cites—for the erroneous proposition that a "century" of Supreme Court

precedent dictates general jurisdiction exists wherever a railroad is doing business—expressly state that § 56 confers venue in the federal courts. *Miles*, 315 U.S. at 710, 62 S. Ct. at 833 ("the provision of § [5]6 'filled the entire field of *venue* in *federal* courts'"); *Pope*, 345 U.S. at 383, 73 S. Ct. at 752 (§ 56 provides an "employee a right to establish *venue* in the *federal* court") (emphasis added). Personal jurisdiction does not result from 45 U.S.C. § 56, and in the century since its enactment, no court has ever concluded that it does.

¶49 Second, assuming for the sake of argument that § 56 does confer personal jurisdiction, it surely does not confer it to state courts. 45 U.S.C. § 56 provides that "an action may be brought in a circuit [district] court *of the United States*, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." (Emphasis added). By its plain language, § 56 applies only to "court[s] of the United States." Seizing on the statute's subsequent language that allows for "concurrent jurisdiction" with the several States, the Court persists that this language grants state courts personal jurisdiction. The phrase "concurrent jurisdiction" is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction. *See* 21 U.S.C. § 467e; 48 U.S.C. § 1704; 21 U.S.C. § 678; 15 U.S.C. § 1829; 29 U.S.C. § 1132(e)(1); *Claflin v. Houseman*, 93 U.S. 130, 134 (1876); *Mims v. Arrow Fin. Servs., LLC*, ___ U.S. ___,

132 S. Ct. 740, 745 (2012).[2],[3] Furthermore, the United States Supreme Court has repeatedly interpreted the concurrent jurisdiction language within 45 U.S.C. § 56 to denote the conveyance of subject-matter jurisdiction. *See, e.g., Chesapeake & Ohio R. Co. v. Stapleton*, 279 U.S. 587, 49 S. Ct. 442 (1929); *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799 (2007). The congressional grant of concurrent jurisdiction with the several States clearly refers to a grant of subject-matter jurisdiction over FELA actions, not a grant of personal jurisdiction over individual defendants.

¶50 Lastly, Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has made clear that the Constitution "grants Congress no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732, 102 S. Ct. 3331, 3340 (1982). Indeed, it is well established that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Hogan*, 458 U.S. at 732, 102 S. Ct. at 3340 (citing *Califano v.*

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[2] In fact, the term dates back even before the passage of the United States Constitution to mean jurisdiction over the cause of action. *See* The Federalist No. 82, p 132 (E. Bourne ed. 1947, Book II) (A. Hamilton).

[3] In conducting research, I could not find a single court that has ever construed concurrent jurisdiction to mean anything other than jurisdiction over the subject matter.

Goldfarb, 430 U.S. 199, 210, 97 S. Ct. 1021, 1028 (1977); *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 10 (1968)).

¶51 As explained above, the requirement that a state court have personal jurisdiction flows from the Due Process Clause of the Fourteenth Amendment and protects the individual "liberty of the nonresident defendant." *Walden*, 134 S. Ct. at 1122. The United States Supreme Court has held that consistent with the guarantee of individual liberty that Clause prohibits a nonresident defendant from being haled into a state court for all purposes unless the defendant's "affiliations with the State in which suit is brought are so constant and pervasive 'as to render it essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851) (brackets omitted). Congress cannot by way of 45 U.S.C. § 56, or any federal law, "restrict, abrogate, or dilute" that constitutional guarantee. *Hogan*, 458 U.S. at 732, 102 S. Ct. at 3340.

III.

¶52 In sum, the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." That Clause prohibits a state court from exercising general jurisdiction over a nonresident defendant unless the defendant's contacts with the State are so pervasive as to render the defendant essentially "at home" in the State. *Daimler*, 134 S. Ct. at 751. Because there is no dispute that BNSF's contacts are not so pervasive as to render it essentially at home in Montana, I would conclude that the two Montana

State District Courts in the consolidated appeals lack general jurisdiction over BNSF under the Due Process Clause of the Fourteenth Amendment.

¶53 The Court does not address whether BNSF consented to jurisdiction in Montana, and I will reserve judgment on that issue as well. For unless the United States Supreme Court meant something other than what it said, I will get an opportunity to ultimately provide my thoughts on that argument in the future.

¶54 I respectfully dissent.

/S/ LAURIE McKINNON

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DA 14-0825

KELLI TYRRELL, as Special Administrator
for the Estate of BRENT T. TYRRELL, deceased,
Plaintiff and Appellee,

v.

BNSF RAILWAY CO.,
Defendant and Appellant.

Defendant/Appellant BNSF Railway Co. (BNSF) has filed a notice of appeal from the order of the Thirteenth Judicial District Court denying its motion to dismiss this action for lack of personal jurisdiction. BNSF moved to certify the order as final, and Plaintiff/Appellee Kelli Tyrrell did not object or respond to the motion. The District Court thereafter issued an order granting BNSF's motion and certifying the order as a final judgment.

Pursuant to M. R. App. P. 6(3)(c), an order denying a motion to dismiss for lack of subject matter jurisdiction is appealable without certification, but an order denying dismissal on personal jurisdiction grounds is not. We have reviewed the District Court's Rule 54(b) certification order and determine that it satisfies the requirements of M. R. Civ. P. 54(b) and M. R. App. P. 6(6). Accordingly,

IT IS ORDERED, pursuant to M. R. App. P. 4(4)(b), that this appeal shall proceed in accordance with the Montana Rules of Appellate Procedure.

The Clerk is directed to provide copies of this order to all counsel of record and to the Honorable Michael Moses, presiding District Judge.

DATED this 13th day of January, 2015.

s/
Chief Justice

s/
s/
s/
s/
Justices

APPENDIX C

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

ROBERT M. NELSON, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	Cause No: DV-11-417 Judge: G. Todd Baugh **MEMORANDUM AND ORDER**

Before the Court is Defendant's Rule 12(b)(2) Motion to Dismiss. The Motion is briefed and deemed submitted.

Plaintiff is a resident of North Dakota, alleging a FELA based claim against the Defendant that occurred in the State of Washington.

I believe 3 Judges in this District have faced similar Motions which they have denied based on applicable precedent. Their rulings seem sound but do not look at whether based on common sense it may be time to reassess FELA cases in Montana which have no forum related connection. The U.S. Supreme Court case of *Daimler v Bauman* (2014), 134 S.Ct. 746 gives us that opportunity.

I.

Currently, this Department (No. 5 of 6 in the Thirteenth Judicial District) has about 12 FELA cases

pending where the Plaintiff is not a Montana resident and where there are no Montana related acts or omissions. There are 52 weeks in a year, about half of which are available for civil jury trials. Allowing for holidays and vacation time leaves maybe 24 weeks for civil jury trials. Scheduling 12 FELA cases that common sense says should be pursued in a different state does have an impact on scheduling civil jury cases of Montana citizens. In about 8 of these cases, the only Montana citizen that wants the cased tried in Montana is Plaintiff's attorney; in the others, not even Plaintiff's lead attorney is a Montana citizen.

Plaintiff point out that in 1945, the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, held that in order to subject appellant to judgment, due process required only that the defendant have certain minimum contacts with the forum state, such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice. Plaintiff's Response Brief, p. 10.

Montana citizens support the Montana Courts with their tax dollars. Are Montana citizens entitled to a little due process, fair play and substantial justice? I submit they are and that a North Dakota resident injured in a State of Washington accident should not burden the Montana taxpayer with his pursuit of justice that common sense tells us all ought to be pursued in North Dakota or Washington.

II.

The Defendant in this case has way more than minimum contacts with the State of Montana. It is a significant, substantial, continuous and systematic

business enterprise in Montana even though its operations in some of the 27 other states it operates in are far greater. It is and expects to be in Court in Montana concerning its operations in Montana, Defendant is found in this state and is subject to the jurisdiction of Montana courts. Rule 4(b) Mt. Rules of Civ. Pro.

How extensively is it subject to the jurisdiction of Montana Courts? Certainly as far as the balance of Rule 4, *supra*, indicates: for claims of relief arising from the doing of business in Montana and arising from any accident resulting in accrual within Montana for a tort action. So, certainly, Defendant's acts and omissions in Montana subject it to the jurisdiction of Montana Courts. This is specific jurisdiction and is no less than what common sense leads us all to know and expect.

III.

But Plaintiff asserts that Montana has general, all-purpose, jurisdiction of Defendant. The questions are: Does it? Should it? And, if so, must it be exercised?

Daimler, supra, a case easily distinguished factually, nonetheless, is the latest word on general jurisdiction and should not be ignored. *Daimler, supra*, speaks in terms of a Defendant's affiliations with a state being so continuous and systematic as to render it essentially at home in the forum state; comparable to a domestic enterprise in the forum state.

Daimler, supra, reasserted from *Goodyear* (citation omitted) that only a limited set of affiliation with a forum state will render a defendant amenable to all purpose jurisdictions. Further, the Court remarked

that general jurisdiction for an individual is his domicile; and for a corporation, an equivalent place, one in which the corporation is fairly regarded as at home.

There seems to be little question that Defendant BNSF would be domiciled or at home in Delaware where it is incorporated or in Texas where its principal place of business is located.

Is BNSF at home in Montana, too? *Daimler* and *Goodyear*, *supra*, tell us that the exercise of general jurisdiction in every state in which a corporation engages in a substantial, continuous and systematic course of business is unacceptably grasping. "At home" is not synonymous with "doing business".

I submit that if Defendant BNSF is "at home" in Montana, it is also "at home" in most, if not all, of the 27 other states in which it operates. Thus, do all these 28 states have general jurisdiction of Defendant BNSF enabling them to hale the BNSF into Court to answer any claims arising anywhere?

IV.

Article II, Section 16, of the Montana Constitution open our Courts to all, denying none. Citizenship, domicile and residency are not factors. Article II, Section 17, provides that no one is to be deprived of life, liberty or property without due process of law.

Jurisdiction in FELA cases is found at 45 U.S.C., § 56. Plaintiff is allowed to file this case in a U.S. District Court in the District where he resides (North Dakota) or in which the cause of action arose (Washington) or in any U. S. District Court in any State in which BNSF does business (those 28 states, which in-

clude North Dakota and Washington). And, this jurisdiction is made concurrent with State Courts (including North Dakota, Montana and Washington).

Thus, has Congress allowed the State of Montana jurisdiction over FELA cases. Congress has not imposed jurisdiction of FELA cases as it does not have that authority. Whatever jurisdiction Montana exercises is limited by due process rights of the parties.

As a practical matter, if these parties, in this case, are allowed to try this case in Montana, it would not be a momentous decision. However, it will be precedent for anyone anywhere to file a case in Montana claiming general all-purpose jurisdiction over any defendant for any relief if the Defendant meets whatever standards exist in Montana for general all purpose jurisdiction.

Based on *Daimler*, *supra*, this Court concludes that Defendant's due process rights prevent this Court from exercising general all-purpose jurisdiction over the Defendant and this Court does not have specific jurisdiction.

Based on common sense, we all know that this case should only be in a U. S. District Court in one of the 28 states where the Defendant does business, or in a State Court in North Dakota or Washington.

IT IS ORDERED that Defendant's Motion is GRANTED and this case is DISMISSED.

DATED this 18th day of November, 2014.

s/
HON. G. TODD BAUGH,
DISTRICT COURT JUDGE

* * *

APPENDIX D

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRRELL (deceased) Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware Corporation, Defendant.	Cause No.: DV 14-699 Judge Michael G. Moses **ORDER GRANTING DEFENDANT'S RULE 54(b) MOTION TO CERTIFY THIS COURT'S *ORDER DENYING DEFENDANT'S RULE 12(b)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION* AS A FINAL JUDGMENT**

This matter comes before the Court on Defendant BNSF Railway Company's (hereafter BNSF) Rule 54(b) Motion to Certify this Court's *Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction* as a Final Judgment filed with this Court on October 27, 2014. No response or objection has been filed in response and the time for such response has run. The Court, having considered the arguments of counsel, and for good cause appearing therefore:

IT IS HEREBY ORDERED that BNSF's Rule 54(b) Motion is hereby GRANTED.

DATED this 14th day of November 2014.

s/
DISTRICT JUDGE

Memorandum

Background

Kelli Tyrrell was appointed in South Dakota as Personal Representative for the Estate of Brent T. Tyrrell and filed the Complaint in this case on May 16, 2014. Complaint, ¶ II. Kelli Tyrrell, as Brent T. Tyrrell's widow, brings this action individually and on behalf of the heirs of Decedent Brent T. Tyrrell. Complaint, ¶ VIII. Plaintiff alleges at the time of his injuries, Decedent had been employed by Defendant BNSF Railway Company, a Delaware Corporation with a principal place of business in Texas. Complaint, ¶ IV.

Plaintiff alleges that over the course of Decedent's career with BNSF, and while working within the scope of his employment with BNSF, Decedent was exposed to carcinogenic chemicals which caused Decedent suffering and premature death. Complaint, ¶ V. Plaintiff alleges that Defendant was negligent and in violation of the Federal Employers' Liability Act (FELA), the Locomotive Inspection Act, Federal Railroad Administration Regulations, and other safety statutes and regulations pertaining to railroad employees and is thus responsible for Decedent's injuries and death. Complaint, ¶ VI. Decedent passed away on September 11, 2011. Complaint, ¶ VII. Defendant

has moved for certification of this Court's *Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction* as a final judgment, which is the subject of this Memorandum and Order.

Legal Standard

Rule 54(b), M.R.Civ.P. provides as follows:

> (b) Judgment on Multiple Claims or Involving Multiple Parties.
>
> (1) When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.
>
> (2) Any order or other decision granted pursuant to Rule 54(b)(1) must comply with the certification of judgment requirements of Montana Rule of Appellate Procedure 6(6).

The Montana Supreme Court has provided factors for the court to consider with respect to Rule 54(b) motions. The factors are:

1. The relationship between the adjudicated and unadjudicated claims;

2. The possibility that the need for review might or might not be mooted by future developments in the district court;

3. The possibility that the reviewing court might not be obliged to consider the same issue a second time;

4. The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final;

5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Roy, 610 P.2d at 1189 (citation omitted).

Weinstein v. University of Montana, 271 Mont. 435, 898 P.2d 101, 105, 1995 5 Mont. LEXIS 130. The Court in *Weinstein* indicated that "[d]epending on the particular case, some or all of the factors may bear upon the propriety of the order granting Rule 54(b) certification."

Discussion

This case meets the requirements for Rule 54(b) certification for the reasons that follow. This case contains more than one request for relief. The overarching claim for relief is for personal injuries and/or wrongful death alleged to have occurred during Plaintiffs employment with BNSF. BNSF seeks to have certified through its Rule 54(b) motion the single issue of personal jurisdiction over BNSF in this particular

case. There are several cases pending in this Court with similar factual circumstances with respect to personal jurisdiction over BNSF. A final ruling on personal jurisdiction is essential to the parties' resolution of this case and certifying this Court's order will expedite resolution of this case.

Directing final judgment on the single issue of personal jurisdiction meets with the requirements of Rule 54(b), M.R.Civ.P. because it relates to only one claim, and not all claims, in this case. Directing final judgment on the issue of personal jurisdiction over BNSF is also necessary in this case because this district has many pending cases with the exact same issue. It is in the interest of judicial economy to grant BNSF's 54(b) order.

Considering the factors provided in the *Weinstein* case, supra., the Court finds the following:

1. The relationship between the adjudicated and unadjudicated claims.

The adjudicated claim in this case is that of personal jurisdiction. This Court found that this Court has personal jurisdiction over BNSF in this case. The outcome of an appeal of this issue has a major impact on the unadjudicated claims in this case. As such, this factor weighs in favor of certification.

2. The possibility that the need for review might or might not be mooted by future developments in the district court.

The need for review will not be mooted by future developments in the district court as this Court has ruled consistently on all Rule 12(b)(2) motions made by BNSF with facts substantially similar to those in

this case. As such, this factor weighs in favor of certification.

3. The possibility that the reviewing court might not be obliged to consider the same issue a second time.

This would be an issue of first impression for the Montana Supreme Court. This factor weighs in favor of certification.

4. The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final.

The Court finds this factor is not applicable in this case.

5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

The Court finds this factor is not applicable in this case.

In sum, the issue BNSF seeks to have certified in this case as a final judgment meets the requirements provided in Rule 54(b), M.R.Civ.P; the factors articulated in the *Weinstein* case weigh in favor of certification; and no objection or response from Plaintiff has been provided for this Court's consideration. Therefore, the Court hereby **GRANTS** BNSF's Rule 54(b) 9 Motion to Certify this Court's *Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction.*

* * *

APPENDIX E

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRELL (deceased), Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware Corporation, Defendant.	Cause No.: DV 14-699 Judge Michael G. Moses **ORDER DENYING DEFENDANT'S RULE 12(b)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

This matter comes before the Court on Defendant BNSF Railway Company's (hereafter BNSF) Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction filed with this Court on July 7, 2014. Plaintiff Kelli Tyrrell filed with the Court a Memorandum of Law in Opposition to Defendant's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction on July 21, 2014. BNSF filed a reply brief on August 7, 2014. The Court, having considered the arguments of counsel, and for good cause appearing therefore:

IT IS HEREBY ORDERED that BNSF's Rule 12(b)(2) Motion to Dismiss is DENIED.

DATED this 7th day of October 2014.

s/
DISTRICT JUDGE

Memorandum

Background

Kelli Tyrrell was appointed in South Dakota as Personal Representative for the Estate of Brent T. Tyrrell and filed the Complaint in this case on May 16, 2014. Complaint, ¶ II. Kelli Tyrrell, as Brent T. Tyrrell's widow, brings this action individually and on behalf of the heirs of Decedent Brent T. Tyrrell. Complaint, ¶ VIII. Plaintiff alleges at the time of his injuries, Decedent had been employed by Defendant BNSF Railway Company, a Delaware Corporation with a principal place of business in Texas. Complaint, ¶ IV.

Plaintiff alleges that over the course of Decedent's career with BNSF, and while working within the scope of his employment with BNSF, Decedent was exposed to carcinogenic chemicals which caused Decedent suffering and premature death. Complaint, ¶ V. Plaintiff alleges that Defendant was negligent and in violation of the Federal Employers' Liability Act (FELA), the Locomotive Inspection Act, Federal Railroad Administration Regulations, and other safety statutes and regulations pertaining to railroad employees and is thus responsible for Decedent's injuries and death. Complaint, ¶ VI. Decedent passed away on September 11, 2011. Complaint, ¶ VII. Defendant has moved for dismissal for lack of personal jurisdiction pursuant to Rule 12(b)(2), M.R.Civ.P., which is the subject of this Memorandum and Order.

Legal Standard

Rule 12(b)(2), M.R.Civ.P. provides as follows:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (2) lack of personal jurisdiction.

Section 45 U.S.C. 56 provides the jurisdiction statute for FELA cases:

> No action shall be maintained under this chapter unless commenced within three years from the day and cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Discussion

This Court adopts and incorporates Judge Todd's ruling on the M.R.Civ.P. 12(b)(2) Motion made in the case of Jesse R. Monroy v. BNSF Railway Company, Cause No. DV 13-799. The Tyrrell case differs from the Monroy case regarding alleged injury, witnesses, locations, and Plaintiff; however, Judge Todd's order is directly on point as regards the facts pertinent to Defendant's Rule 12(b)(2) Motion as follows: (1) in both the Monroy case and Tyrrell case the alleged injuries occurred outside the state of Montana; (2) BNSF is the

Defendant in both actions; (3) BNSF is incorporated in Delaware; (4) BNSF's principle place of business is in Texas; and (4) Montana was the chosen forum state to bring each FELA action. Because the necessary factual circumstances of the Tyrrell case align with those in the Monroy v. BNSF case, and because this Court agrees with Judge Todd's rationale for denying BNSF's Rule 12(b)(2) Motion to Dismiss in the Monroy case, this Court hereby adopts and incorporates Judge Todd's Order Denying Defendant's Motion to Dismiss filed on August 1, 2014 in the case of Monroy v. BNSF, Cause No. DV 13-799, a copy of which is attached hereto as Exhibit A.

* * *

EXHIBIT A

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

JESSE R. MONROY, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	Cause No. DV 13-0799 Judge Gregory R. Todd **ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

The Complaint in this case was filed on June 27, 2013, alleging that Jesse R. Monroy (Monroy) was injured while working for Defendant BNSF Railway Company (BNSF) on July 1, 2010. The facts in the Complain are not in dispute. Monroy is a citizen of

Idaho, and BNSF is incorporated in Delaware and has its principal place of business in Texas. Monroy was injured while working in the State of Washington and has now brought suit in the Thirteenth Judicial District for the State of Montana, in Billings, Montana. Monroy seeks relief under the Federal Employers Liability Act (FELA). 45 U.S.C. § 1 *et seq*.

MONTANA JURISDICTION

On April 24, 2014, BNSF filed a motion to dismiss and brief in support thereof. BNSF's motion was made pursuant to Rule 12(b)(2), M.R.Civ.P. Said Rule states:

> "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> ***
>
> (2) lack of personal jurisdiction;"

In essence, BNSF argues that this action in Montana must be dismissed for lack of personal jurisdiction over BNSF because it is made by an Idaho citizen for injuries sustained in Washington in a Montana court.

Both parties agree that when a motion to dismiss is made under Rule 12(b)(2) for lack of personal jurisdiction, a decision must be based on the facts alleged in the complaint, and those facts must be construed in the light most favorable to the plaintiff. Additionally, the motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Threlkeld v. Colorado*, 2000 MT 369, ¶ 7, 303 Mont. 432, 16 P.3d 359.

In Montana, jurisdiction over persons or corporations is found in Rule 4(b)(1), M.R.Civ.P., commonly referred to as long-arm jurisdiction, which reads as follows:

> "All persons found within the State of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:
>
> (A) the transaction of any business within Montana;
>
> (B) the commission of any act resulting in accrual within Montana of a tort action;
>
> (C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;
>
> (D) contracting to insure any person, property, or risk located within Montana at the time of contracting;
>
> (E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such a person;
>
> (F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or
>
> (G) acting as personal representative of any estate within Montana." (Emphasis supplied).

In Montana, personal jurisdiction can be characterized as either general or specific. As stated in Rule 4(b)(1), general jurisdiction exists over "all persons found within the State of Montana...."

> "A party is 'found within' the state if he or she is physically present in the state or if his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there. A non-resident defendant that maintains 'substantial' or 'continuous and systematic' contacts within the forum state is found within the state and may be subject to that state's jurisdiction even if the cause of action is unrelated to the defendant's activities within the forum." (Emphasis supplied).
>
> *Simmons Oil Corp. v. Holly Corp*, 244 Mont. 75, 83, 796 P.2d 189, 194 (1990).

A decade after *Simmons*, the Montana Supreme Court again discussed personal jurisdiction and stated that it can either be general jurisdiction or specific jurisdiction. A non-resident defendant found within Montana for general jurisdiction purposes must meet certain criteria:

> "Before the activities of a foreign corporation can create a physical presence within Montana, those activities must be substantial, continuous, and systematic as opposed to isolated, casual, or incidental. The activities must comprise a significant component of the company's business, although the percentage as related to total business may be small." (Emphasis supplied).
>
> *Threlkeld* at ¶ 14.

The exercise of specific jurisdiction over a non-resident defendant can be found pursuant to the subparagraphs A-F of Rule 4(b)(1). In assessing the sufficiency of contacts by a non-resident defendant corporation to find specific jurisdiction in Montana, the Montana Supreme Court adopted in 1990 a Ninth Circuit test to determine if exercising jurisdiction comports with due process:

> "(1) the non-resident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its laws.
>
> (2) the claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) the exercise of jurisdiction must be reasonable."
>
> *Simmons*, 244 Mont. at 85, 796 P.2d at 195.

BNSF argues that under the Montana Rules of Civil Procedure, under either a general jurisdiction test or a specific jurisdiction test, BNSF is not found within Montana. BNSF argues that whether analysis of jurisdiction is considered under the found within general jurisdiction requirement or the substantial, continuous and systematic presence specific jurisdiction requirement that jurisdiction over BNSF in this case fails.

Although Monroy argues that jurisdiction is found over BNSF in this Court under both general and specific analyses, it is difficult to find specific jurisdiction.

But BNSF in this case does meet the criteria of being found within Montana and having substantial, continuous and systematic activities within Montana for general jurisdiction purposes under Rule 4(b)(1) pursuant to *Simmons* and *Threlkeld*.

UNITED STATES SUPREME COURT

BNSF also argues that two recent United States Supreme Court cases have further defined as well as limited jurisdiction of courts regarding foreign defendants. In a 2011 case, North Carolina residents filed a wrongful death action in North Carolina State Court regarding a bus accident outside Paris, France, in which their sons died. Plaintiffs alleged that the accident was caused by a defective tire manufactured by the Turkish subsidiary of Goodyear USA. The named defendants were Goodyear USA, an Ohio corporation, and three Goodyear USA subsidiaries from Turkey, France and Luxembourg. Goodyear USA did not contest jurisdiction of the North Carolina courts, but the three foreign subsidiaries argued that North Carolina lacked jurisdiction over them. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US ___, 131 S.Ct. 2846, 2850, 180 L.Ed. 2d 796 (2011).

The first paragraph of the *Goodyear* decision frames the issue:

> "This case concerns the jurisdiction of state courts over corporations organized and operating abroad. We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?"

Goodyear, 131 S.Ct. at 2850.

The three Goodyear USA subsidiaries were incorporated in their respective countries and are "indirect subsidiaries of Goodyear USA., an Ohio corporation." The subsidiaries manufactured their tires primarily for sale in Europe and Asia. The tires they manufactured "differ in size and construction from tires ordinarily sold in the United States." The tires were "designed to carry significantly heavier loads, and to serve under road conditions and speed limits in the manufacturers' primary markets." *Goodyear*, 131 S.Ct. at 2852.

Goodyear USA did not contest personal jurisdiction of the North Carolina State Court. The three subsidiaries, who were the petitioners in *Goodyear*, were not registered to do business in North Carolina; had no employees, bank accounts or places of business in North Carolina; did not design, manufacture or advertise their products in North Carolina; and they did not solicit business in North Carolina or sell or ship tires themselves to North Carolina customers. The type of tire involved in this accident was manufactured by Goodyear Turkey and was never distributed in North Carolina. *Goodyear*, 131 S.Ct. at 2852.

Such a paucity of contacts described above with North Carolina created:

> "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina Courts to entertain claims unrelated to the foreign

corporation's contacts with the state." (Emphasis supplied).

Goodyear, 131 S.Ct. at 2851.

The *Goodyear* case went on to state that:

"*International Shoe* distinguished from cases that fit within the 'specific jurisdiction' categories, 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.' 326 US at 318, 66 S.Ct. 154, 90 L.Ed 95. Adjudicatory authority so grounded is today called 'general jurisdiction.' (citation omitted). For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded at home." (Emphasis supplied).

Goodyear, 131 S.Ct. at 2853-2854.

BNSF also strongly relies on the very recent United States Supreme Court case of *Daimler AG v. Bauman*, 134 S.Ct. 746, 187 L.Ed. 2d 624 (2014). Justice Ginsburg's first sentence of the *Daimler* opinion states: "This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." 134 S.Ct. at 750. The plaintiffs in the *Daimler* case were twenty-two Argentinian residents who filed suit against a German public stock company, DaimlerChrysler Aktiengesellschaft (Daimler AG), in U.S.

District Court in California. Plaintiffs asserted claims under two federal statutes, the Alien Tort Statute and the Torture Victim Protection Act, alleging that Mercedes-Benz Argentina, Daimler AG's Argentinian subsidiary, collaborated with Argentinian State Security Forces to kidnap, detain, torture and kill Mercedes-Benz Argentina workers during Argentina's Dirty War from 1976 through 1983. Plaintiffs argued that jurisdiction was proper in Federal District Court in California based on the California contacts of Mercedes-Benz U.S.A., a subsidiary of Daimler AG, which is incorporated in Delaware and has its principal place of business in New Jersey. Mercedes-Benz U.S.A. distributes vehicles that are manufactured by Daimler AG to independent dealerships in the United States, including California. *Daimler*, 134 S.Ct. at 750-751.

The Supreme Court first presented the issue at the start of the decision as:

> "The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."
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> *Daimler,* 134 S.Ct. at 751.

Later in the opinion, the Supreme Court stated that, after giving background regarding long-arm jurisdiction, that ..."the question is whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts." *Daimler*, 134 S.Ct. at 758.

After a discussion of long-arm jurisdiction and the case of *International Shoe Co. v. Washington*, 326 US 10, 66 S.Ct. 154, 90 L.Ed 95 (1945) as well as *Goodyear*, the Supreme Court narrowed the focus of the *Daimler* case:

> "In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the specific jurisdiction category. Nor did plaintiffs challenge on appeal the district court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction."
>
> *Daimler*, 134 S.Ct. at 758.
>
> The Supreme Court went on to state:
>
> "This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary."
>
> *Daimler*, 134 S.Ct. at 759.

In further analyzing the case regarding subsidiaries and parent corporations, the Supreme Court stated:

> "Even if we were to assume that Mercedes-Benz USA is at home in California, and further to assume Mercedes-Benz USA's contacts are imputable to Diamler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."
>
> *Daimler*, 134 S.Ct. at 760.

The *Daimler* Court went on to contrast continuous and systematic from the specific jurisdiction analysis of *International Shoe* to general jurisdiction.

> "Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit...on causes of action arising from dealings entirely distinct from those activities.' *Id.*, at 318, 66 S.Ct. 154, 90 L.Ed 5 (emphasis added). *See also* Twitchel, Why We Keep Doing Business with Doing-Business Jurisdiction, 2001 U.CHI. Legal Forum 171, 184 (*International Shoe* 'is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found.') Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic' as to render [it] essentially at home in the forum State.' (citing *Goodyear*, 131 S.Ct. at 2851)."
>
> *Daimler*, 134 S.Ct., at 761. (Emphasis supplied).

At the end of the above paragraph the U.S. Supreme Court placed Footnote 19. Said Footnote states:

> 'We do not foreclose the possibility that in an exceptional case, see, e.g., *Perkins*, described supra, at ___-___, 187 L.Ed. 2d, at 634-636, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or

> principal place of business may be so substantial and of such a nature as to render the corporation at home in that state. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum state, see infra, at ___, 187 L.Ed. 2d, at 642, quite another to expose it to suits on claims having no connection whatever to the forum state."

The above paragraph from the *Daimler* opinion and Footnote 19 form BNSF's major argument that this Court does not have jurisdiction to hear this case.

The key issue in this case under recent U.S. Supreme Court cases is whether BNSF is at home in Montana so that this action by an Idaho resident for an injury in Washington can be brought in Montana. BNSF argues that, pursuant to *Daimler* and *Goodyear*, that this action can only be filed in Washington (where injury occurred) or Texas (principal place of business) or Delaware (State of incorporation). A very recent United States District Court case disagrees:

> "*Goodyear* did <u>not</u> hold that a corporation may be subject to general jurisdiction <u>only</u> in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose." *Daimler*, 134 S.Ct. at 760 (Emphasis added); *see Goodyear*, 131 S.Ct. at 2855. Nonetheless, 'only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.' *Ibid*" (Emphasis added).

Air Tropiques, SPRL v. Northern & Western Ins. ___ F. Supp. ___ U.S. District Court, SD, Houston Division (March 31 2014). 2014 WL 1323046.

The *Air Tropiques* case involved an air carrier organized under the laws of the Democratic Republic of Congo filing suit against its own insurance carrier in Texas in a first-party insurance coverage dispute regarding the crash of a Northern & Western insured airplane in the Republic of Congo. In *Goodyear*, the U.S. based parent corporation admitted jurisdiction in North Carolina, but the case involved an accident in France regarding tires that were manufactured by a Goodyear USA Turkish subsidiary on tires that were not sold in the United States. In *Daimler*, suit was brought in California against a German corporation regarding actions of Daimler AG's Argentinian subsidiary for kidnapping, detaining and torturing Argentinian employees of the subsidiary.

In this case, there is no BNSF subsidiary involved. Although Monroy is a foreigner, in the sense that he lives in Idaho and the cause of action arose in the foreign jurisdiction of Washington, Monroy was injured while working for BNSF and not a subsidiary of BNSF. More importantly, this Court does not have to wind its way through a labyrinth of corporate subsidiaries to answer the question of whether it has jurisdiction over a parent corporation. The ties of the subsidiaries in *Daimler* and *Goodyear* to the jurisdiction in which the case was brought were tenuous at best. This tenuous connection of corporate subsidiaries to the court in which the case was brought was the major impediment to the establishment of jurisdiction by the plaintiffs in *Daimler* and *Goodyear*.

In this case, BNSF operates in 28 states in the United States. According to the affidavit of James Obermiller, Director of Corporate Support & Compliance for BNSF, approximately 6% of the track mileage (2,061 of 32,500 total) of BNSF is found in Montana, less than 5% of the employees (2,112 of 43,000 total) are found in Montana, and less than 10% of the revenues for BNSF are generated in Montana. One of BNSF's 24 automotive facilities (4%) is in Montana.

The attachments to the Affidavit of Bob Fain show that BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years. In 2014, BNSF is spending system wide $4.1 billion on capital improvements and many are in the Bakken area. In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum. Outbound Bakken crude deliveries are expected to jump from 24 locations in 2014 to 50 in 2015. In the last year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development. These are not insubstantial numbers. *See Threlkeld*, ¶ 14.

The factual settings of *Daimler* and *Goodyear* are clearly distinguishable from this case. This case arises totally in the United States and all parties are American. No corporate subsidiaries are involved in this case - BNSF is the sole defendant. BNSF is at home in Montana in this case as its affiliations with

the State are so continuous and systematic that, pursuant to *Goodyear* and *Daimler*, general jurisdiction over BNSF in Montana is established.

FELA

The argument of BNSF regarding lack of jurisdiction in this case is made more difficult by a number of Montana Supreme Court cases that have dealt with jurisdiction, venue and forum non conveniens in railroad cases. Coupled with the interpretation by the Montana Supreme Court of the Federal Employers Liability Act (FELA), BNSF's argument becomes even tougher. Starting in at least 1959 in dealing with forum non conveniens arguments by railroads, the Montana Supreme Court reflected an open court policy and liberal construction of FELA. "Recognizing the open court policy stated in our Montana Constitution and the FELA policy favoring the injured railway worker's choice of forum, this Court has held the doctrine of forum non conveniens inapplicable to FELA actions brought in Montana's district courts." *Haug v. BNSF* and *Lay v. BNSF*, 236 Mont. 368, 375, 770 P.2d 517, 521 (1989). *See also Bracy v. Great Northern Railway Co.*, 136 Mont. 65, 343 P.2d 848 (1959); *State Ex Rel. Great Northern Railway Co. v. District Court*, 139 Mont. 453, 365 P.2d 512 (1961); *LaBella v. Burlington Northern, Inc.*, 182 Mont. 202, 595 P.2d 1184 (1979); *Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979); *State Ex Rel. Burlington Northern Railway Co. v. District Court*, 229 Mont. 325, 746 P.2d 1077 (1987).

In *LaBella*, a Washington resident was injured in Washington and filed suit in Lewis & Clark County in

Montana. A motion to dismiss was made by Burlington Northern on the grounds of forum non conveniens. *LaBella*, 182 Mont. at 203, 595 P.2d at 1185. *LaBella* specifically said for the first time that the Montana Supreme Court was "squarely faced with the relation of forum non conveniens to FELA actions." It then went on to cite specifically from the jurisdictional statute of FELA, 45 USC § 56:

> "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." (Emphasis added).
>
> *LaBella*, 182 Mont. at 204, 595 P.2d at 1186.

LaBella extensively cites the legislative history of FELA jurisdiction. FELA is to be given a liberal construction in favor of injured railroad employees to accomplish its humanitarian and remedial purposes. *LaBella* quotes President Theodore Roosevelt in a 1907 message to Congress as well as a Senate Committee report. Senator Borah from Idaho is specifically quoted in favor of FELA jurisdiction allowing the corporation to be sued at any place where it is carrying on business. Additionally, the refusal in 1947 to pass the Jennings Bill which would have repealed most of the jurisdiction rules for FELA is cited. *LaBella*, 182 Mont. at 205-206, 595 P.2d at 1186.

At least as recently as 2005, the Montana Supreme Court has again reinforced liberal FELA jurisdiction in a change of venue case. *Rule v. Burlington Northern & Sante Fe Ry.*, 2005 MT 6, 325 Mont. 329, 106 P.3d 533. In addition to denying BNSF's motion for change of venue from Dawson County, where the accident arose, to Cascade County, where the case was filed, the Montana Supreme Court said:

> "There can be no dispute that both federal law and courts, and this Court, are protective of broad venue rights for FELA plaintiffs. Pursuant to federal statute, a federal district court has jurisdiction of a FELA action, concurrent with the jurisdiction of state courts, if the defendant resides in or does business in that federal court's district or if the cause of action arose in that district. See 45 U.S.C. § 56. *Rule*, ¶ 16." (Emphasis supplied).

The authority of specific FELA jurisdiction found in 45 U.S.C. § 56 must be given great deference in this case involving a railroad worker and a railroad. Nothing in *Daimler* or *Goodyear* make any reference to FELA. The particular controls the general. § 1-2-102, M.C.A.

COMMERCE CLAUSE

Both parties submitted supplemental memorandums regarding the impact of the Commerce Clause of the U.S. Constitution (Art. I, § 8, Cl. 3) and the Due Process Clause of the 14th Amendment of the U.S. Constitution on this case. Monroy states that in 1912, the U.S. Supreme Court held that FELA was a constitutionally valid exercise of power to regulate railroad employees engaged in interstate commerce:

> "This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution.
>
> The duties of common carriers in respect to the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power.
>
> * * *
>
> We conclude that rights arising under the act in question [FELA] may be enforced, as of right, in the courts of States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers' Liability Cases*, 221 U.S. 1, 47-49 (1912).

A century later, Justice Roberts sustained the constitutionality of the Affordable Care Act in the context of the Commerce Clause:

> 'The Constitution authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States, and within the Indian Tribes' Art. I. § 8, Cl. 3. Our precedents read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those

> activities that substantially affect interstate commerce.'... The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock and a loan shark's extortionate collections from a neighborhood butcher shop."
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> *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2599 (2012).

Monroy argues that the FELA jurisdictional statute, 45 U.S.C. § 56, does not violate the Due Process Clause of the U.S. Constitution. Furthermore, the substantive due process rights of any railroad under FELA are not impaired by FELA.

BNSF says that Monroy misses the point of the Commerce Clause discussion. It is admitted by BNSF that Congress can regulate commerce between the States and Congress has the power to regulate railroads engaged in interstate commerce. But, according to BNSF, Congress did not, and could not, deprive BNSF of its constitutional rights by enacting FELA.

BNSF says nothing in *Daimler*'s personal jurisdiction analysis is inconsistent with FELA. But *Daimler* is not a specific due process challenge to FELA and does not implicate Congress' authority under the Commerce Clause relating to BNSF. What BNSF does argue is that FELA only refers to subject matter jurisdiction and does not address personal jurisdiction in state court. 45 U.S.C. § 56 has nothing to do with personal jurisdiction and is not contrary to *Daimler* according to BNSF.

BNSF also argues that Congress' authority under the Commerce Clause is limited by the Due Process Clause and that the Commerce Clause gives no power to Congress to modify or eliminate fundamental due process rights. Substantive due process rights relating to personal jurisdiction are not addressed by Monroy says BNSF.

The *Daimler* court framed the issue in that case in the second paragraph of the case:

> "The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over *Daimler* in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."
>
> *Daimler*, 134 S.Ct. at 751.

First, the reliance of BNSF on its personal jurisdiction argument ignores the framing of the jurisdictional issues in both *Goodyear* and *Daimler*.

> "In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___, 131 S.Ct. 2846, 180 L.Ed. 2d 796 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum state.'"

Daimler, 134 S.Ct. at 751.

Likewise, the *Daimler* court turned to the discussion of general and specific jurisdiction:

> "With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the specific jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction."
>
> *Daimler*, 134 S.Ct. at 758.

The analyses of all cited cases, and *Goodyear* and *Daimler* in particular, discuss jurisdiction and personal jurisdiction. But the key distinction was not substantive due process versus personal jurisdiction, it was general jurisdiction versus specific jurisdiction.

Second, BNSF's reliance on *Daimler* on page 5 of its Response to Plaintiff's Supplemental Memoranda is illuminating:

> "*Daimler* was, undoubtedly, an expression by the U.S. Supreme Court of a due process limitation prescribed by the Constitution. *Daimler*, 134 S.Ct. at 751 ("The question presented here is whether the Due Process Clause of the 14th Amendment precludes the district court from exercising jurisdiction over *Daimler* in

> this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint"). By contrast, none of the authority cited in Monroy's supplemental brief concerned individual liberty interests guaranteed by the Due Process Clause."

The *Daimler* case dealt with due process and jurisdiction of a case brought by Argentinian plaintiffs against a German corporation through its United States subsidiary corporation in a California federal court. That is a far different factual situation from this case which involves an Idaho employee of BNSF who was injured in Washington and brought suit in Montana pursuant to the specific federal jurisdiction of FELA against BNSF and not against a BNSF subsidiary.

Third, nothing in BNSF's due process argument changes any of the analysis above. Unless and until the Montana Supreme Court or the U.S. Supreme Court specifically deny jurisdiction in such a challenge to FELA jurisdiction and specifically overrule or limit 45 U.S.C. § 56, the vitality of said FELA jurisdictional statute will remain.

CONCLUSION

BNSF argues *Daimler* and *Goodyear* have significantly narrowed the scope of long-arm jurisdiction in all cases. According to BNSF, there is no specific jurisdiction by Monroy in this case because the injury occurred in Washington and there is no general jurisdiction in this case as BNSF is not at home in Montana. Recent U.S. Supreme Court case law trumps

not only Montana civil procedure and Montana case law, according to BNSF, but also trumps FELA law.

Monroy argues that *Goodyear* and *Daimler* do not preclude long-arm general jurisdiction in this case. Both *Goodyear* and *Daimler* involved overseas foreign subsidiaries, and the events that triggered the lawsuit occurred overseas. Here, the sole corporate party is BNSF. No subsidiary is involved. In *Goodyear* and *Diamler*, the injured parties tried to bootstrap jurisdiction with precarious or flimsy contacts by the subsidiary to the court in either North Carolina or California. Here, although Monroy's injury occurred in Washington, BNSF has a significant presence in Montana. In this case, Montana is a paradigm forum, and BNSF is at home in Montana.

Under Montana long-arm jurisdiction Rule 4(b)(1), BNSF is found within Montana for general jurisdiction purposes. A long line of Montana cases has consistently denied efforts by BNSF to challenge jurisdiction or venue.

But BNSF also asks this Court to ignore or overrule or distinguish over 100 years of state and federal FELA case law and specifically 45 U.S.C. § 56. *Goodyear* and *Daimler* ruled on general long-arm jurisdiction law. To have those two United States Supreme Court cases, that did not involve FELA, limit or control FELA jurisdiction based on the facts of those cases involving overseas foreign subsidiaries is a stretch that this Court is unwilling to make. BNSF has not carried its burden with its motion to dismiss for lack of personal jurisdiction. In light of the distinguishable facts of *Goodyear* and *Daimler* from the

facts in this case as well as the strong and specific FELA law and the broad FELA jurisdictional statute,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is **DENIED**.

DATED this 30th day of July, 2014.

s/

HON. GREGORY R. TODD,
District Court Judge
DV 13-799

* * *

APPENDIX F

U.S. Constitution, Amendment 14, Section 1

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Montana Rule of Civil Procedure 4. Persons Subject to Jurisdiction; Process; Service.

(a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, a resident of this state, or organized under the laws of this state, includes:

* * *

(3) a corporation;

* * *

(b) Jurisdiction of Persons.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

(A) the transaction of any business within Montana;

(B) the commission of any act resulting in accrual within Montana of a tort action;

(C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;

(D) contracting to insure any person, property, or risk located within Montana at the time of contracting;

(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;

(F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or

(G) acting as personal representative of any estate within Montana.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by Montana courts over any person:

(A) through service of process as herein provided; or

(B) by the voluntary appearance in an action by any person either personally or through an attorney, authorized officer, agent, or employee.

* * *

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 28 2016
OFFICE OF THE CLERK

No. 16-405

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell, and ROBERT M. NELSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

RESPONDENTS' BRIEF IN OPPOSITION

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November 2016

QUESTION PRESENTED

Did the court below correctly hold that Congress may confer on state courts the authority to exercise personal jurisdiction over a U.S.-based defendant to adjudicate a claim under the Federal Employers' Liability Act, 45 U.S.C. § 56, without violating the Due Process Clause of the Fourteenth Amendment?

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INTRODUCTION

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, provides a federal cause of action to common-carrier railroad employees who are injured on the job due to their employers' negligence. In crafting FELA's protections, Congress recognized "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation" of a carrier to bring suit. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Congress therefore permitted an expansive set of federal and state courts to serve as proper venues and to exercise personal jurisdiction over railroads in FELA cases. In particular, a railroad may be sued under FELA in any jurisdiction where it is "doing business" at the time of suit. 45 U.S.C. § 56.

The Montana Supreme Court held that the state's courts had personal jurisdiction over defendant BNSF Railway Company to adjudicate FELA claims brought by an injured worker and another worker's widow because (1) FELA permitted them to do so where BNSF was "doing business" in Montana and (2) the state's long-arm statute encompassed BNSF for the purpose of these disputes. BNSF contends that this exercise of personal jurisdiction violates its Fourteenth Amendment due process rights under the standard for assessing general jurisdiction set forth in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

The petition for a writ of certiorari should be denied for three related reasons. First, neither *Daimler* nor any other case cited by BNSF addresses the question whether the Fourteenth Amendment limits *Congress's* power to establish where within the United States a U.S.-based defendant can be sued on a federal claim. *Daimler* addresses a court's power to exercise all-

purpose jurisdiction over a defendant, that is, to hear any and all claims against the defendant, and the state supreme court did not purport to do that here.

Second, although BNSF asserts a split in authority with respect to whether FELA obviates the need to consider whether state courts have personal jurisdiction over defendants, the cases it cites manifest no such conflict. All of the state supreme court cases that BNSF claims conflict with the decision below hold that even where FELA would authorize a state court to exercise personal jurisdiction over a FELA defendant, the court may do so only if the state's long-arm statute also permits it. Although it interprets Montana's long-arm law to permit adjudication of the claims in this case, the decision below expressly agrees with that proposition.

Third, the decision below is correct. Congress has broad power to permit state courts to exercise personal jurisdiction over U.S.-based defendants for the adjudication of federal claims. That congressional power, unlike the power of states to assert their own authority over out-of-state defendants, is not constrained by the limits on the territorial reach of state authority incorporated in the Fourteenth Amendment. And for roughly a century, state courts have adjudicated FELA claims, and this Court has reviewed such adjudications without objection, where the only connection between the state and the defendant was the defendant's ongoing business in the forum. To the extent that BNSF objects to this established practice, its complaint is best directed to Congress.

STATEMENT

I. Statutory Background

In 1908, Congress adopted FELA in recognition "of the physical dangers of railroading that resulted in the

death or maiming of thousands of workers every year." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). It aimed "to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Id.* (internal quotation marks omitted).

When FELA was initially enacted, a plaintiff could bring a FELA claim again a common-carrier railroad operating in interstate commerce in any jurisdiction in which the defendant was an "inhabitant." *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Congress soon determined that the possibility that an employee could be forced to litigate in a distant forum and to incur correspondingly greater expenses was unjust. *Id.* at 49-50. Accordingly, in 1910, Congress amended FELA to provide a broader grant of jurisdiction and venue to courts. As amended, this jurisdiction-granting provision currently provides:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56. Reflecting the importance Congress attached to respecting plaintiffs' choice of forum for FELA claims, Congress has also provided that such claims filed in state court may not be removed to federal district court. 28 U.S.C. § 1445(a).

As this Court has recognized, FELA's broad language with respect to the proper forum for a plaintiff's claim "must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who

submitted the report on the bill [to amend the statute], 'to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.'" *Kepner*, 314 U.S. at 50.

II. Factual Background and Proceedings Below

BNSF owns and operates rail lines in Montana, is licensed to do business in Montana, and has offices and agents in that state. Pet. App. 13a. BNSF is incorporated in Delaware and has its principal place of business in Texas. *Id.* 48a.

In 2011, Robert Nelson, a North Dakota resident and BNSF employee, filed suit against BNSF in a Montana state court, seeking damages under FELA for injuries during the course of his employment. *Id.* 3a. In 2014, Kelli Tyrrell, a South Dakota resident and the widow of Brent Tyrrell, another BNSF employee, also filed suit in a Montana state court seeking damages under FELA related to the death of her husband, who was injured while working for BNSF. *Id.* 3a, 48a. Neither plaintiff alleged that the injuries occurred in Montana. *Id.* 3a.

BNSF moved to dismiss both suits for lack of personal jurisdiction. *Id.* 3a-4a. The court presiding over Nelson's case granted the motion to dismiss. *Id.* 40a. The court presiding over Tyrrell's case denied the motion but certified its order for appeal. *Id.* 41a-42a, 47a.

The Montana Supreme Court consolidated the two cases on appeal. BNSF argued that neither "the Due Process Clause of the Fourteenth Amendment" nor Montana state law authorized personal jurisdiction over BNSF in the Montana state courts. BNSF's Opening Br. in Mont. S. Ct. 1. Nelson and Tyrrell responded that FELA conferred personal jurisdiction over BNSF in Montana courts and that Montana state law permitted the exercise of that jurisdiction over out-of-state

defendants in FELA suits comparable to those brought by Tyrrell and Nelson. Tyrrell and Nelson also contended that BNSF had consented to jurisdiction in Montana and was "at home" there, thus permitting adjudication of any and all claims against BNSF in Montana courts under this Court's general jurisdiction jurisprudence.

The Montana Supreme Court first held that FELA authorized the state courts to exercise personal jurisdiction over BNSF for adjudication of FELA claims. It emphasized that the U.S. Supreme Court had consistently interpreted FELA "to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a. It noted, for example, that in *Miles v. Illinois Central Rail Co.*, 315 U.S. 698 (1942), the plaintiff was a Tennessee resident injured while working in Tennessee for an Illinois-based railroad defendant. Nevertheless, *Miles* held that suit in Missouri was proper because FELA permitted "'suits in state courts, despite the incidental burden, where process may be obtained on a defendant . . . actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.'" Pet. App. 9a (quoting *Miles*, 315 U.S. at 702).

The state supreme court also relied on *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), which addressed the authority of a Missouri court to adjudicate a FELA claim over out-of-state railroads for injuries that occurred out of state. Pet. App. 12a. *Terte* held that one of the railroads "was properly sued" in Missouri where that railroad owned and operated rail lines in the state, was licensed to do business in Missouri,

and had an office and agents there. *Id.* 13a (quoting *Terte*, 284 U.S. at 286).

The state supreme court concluded that it was "undisputed that BNSF owns and operates railroad lines in Montana" and is "licensed to do business and has offices and agents" there. *Id.* Because BNSF was doing business in Montana, FELA permitted Montana courts to exercise personal jurisdiction over it to adjudicate FELA claims. *Id.*

The Montana Supreme Court rejected BNSF's argument that the exercise of personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment. The court recognized that *Daimler* held for Fourteenth Amendment purposes that "general jurisdiction requires foreign corporations to have affiliations so 'continuous and systematic' as to render them 'at home' in the forum state." *Id.* 12a (quoting *Daimler*, 134 S. Ct. at 749). But it observed that neither *Daimler* nor any of the other cases on which BNSF relied involved congressional power to authorize state courts to exercise personal jurisdiction over defendants on FELA claims. *Id.* 11a. It declined "to depart from the language of 45 U.S.C. § 56—and from a century of U.S. Supreme Court precedent interpreting it." Pet. App. 15a.

Importantly, the state supreme court recognized that "FELA does not require states to entertain suits arising under it." *Id.* "[R]ather it empowers them to do so where local law permits." *Id.* The court thus examined the scope of Montana's long-arm rule and determined that it permitted the exercise of personal jurisdiction over BNSF here. *Id.* 16a-19a.

Accordingly, the state supreme court reversed the dismissal of Nelson's complaint and affirmed the district

court order denying BNSF's motion to dismiss Tyrrell's complaint. *Id.* 2a-3a.[1]

Justice McKinnon dissented. She would have held that FELA did not confer personal jurisdiction on state courts. *Id.* 29a. She also would have held, regardless of whether FELA could be read to confer personal jurisdiction on state courts, that the exercise of personal jurisdiction over BNSF by Montana courts would violate the Due Process Clause of the Fourteenth Amendment because BNSF, although engaged in "substantial business in Montana," was not at home there. *Id.* at 23a, 32a-33a.

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Consistent with This Court's Precedent on Personal Jurisdiction.

Consistent with the Fourteenth Amendment, a state court may exercise two types of personal jurisdiction over defendants. General jurisdiction—also referred to as "all-purpose" jurisdiction—involves the exercise of "personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984). A court that lacks general jurisdiction over a defendant may exercise specific jurisdiction "in a suit arising out of or related to" such contacts. *Id.* at 414 n.8.

BNSF argues that the decision below conflicts with *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which fleshes out the standard for the appropriate exercise of general jurisdiction over corporate entities, and this

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[1] In light of its holding, the court had no occasion to address the plaintiffs' argument that BNSF consented to personal jurisdiction. Pet. App. 19a.

Court's other decisions addressing Fourteenth Amendment limitations on state courts' personal jurisdiction. This line of cases is inapposite. To argue otherwise, BNSF fundamentally misconstrues the holding and rationale of the decision below.

A. In *Daimler*, this Court held that, for a court to exercise general jurisdiction over a corporate defendant, the defendant must have its principal place of business in the forum state, be incorporated there, or otherwise have contacts with the forum that are sufficiently "continuous and systematic as to render [the defendant] essentially at home" there. 134 S. Ct. at 760-61 & n.19 (internal quotation marks omitted). Because the defendant in *Daimler* had none of these contacts, this Court held that California's long-arm statute could not be extended to permit general jurisdiction over the company for the adjudication of claims based on state, federal, and Argentine law. *Id.* at 751-52, 762.

BNSF argues that the decision below "created an 11-1 split" of authority on whether *Daimler*'s standard for the exercise of general jurisdiction "applies in purely domestic cases." Pet. 11. It contends that the Montana Supreme Court refused to apply *Daimler* "in part because this case does not involve foreign parties and an overseas injury." *Id.*; *see also id.* 15, 23. BNSF's attempt to manufacture a disagreement among courts on this issue should be rejected.

As an initial matter, *Daimler* is beside the point because the Montana Supreme Court did *not* hold that Montana state courts could exercise general jurisdiction, as that term is used in this Court's case law, over BNSF. Although the court below did in some passages of its opinion refer to the Montana state courts as having general personal jurisdiction over BNSF, it is clear in

context that the court's ruling extends only to jurisdiction where a FELA claim has been asserted. The court explained, for example, that the question at issue was whether BNSF was "subject to suit *under the FELA* by way of 'doing business' in Montana." Pet. App. 12a (emphasis added); *see also id.* (rejecting argument that *Daimler* "overrule[d] decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business'"). BNSF's contention (at 23) that the decision subjects "every domestic company that does any business in Montana (particularly railroads) . . . to general personal jurisdiction" there is flatly incorrect.

In addition, BNSF is wrong in contending (at 11) that the court below held *Daimler* inapplicable because the defendant in that case was a foreign company and the injury occurred abroad. Rather, the court held that *Daimler* did not apply because it "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. In the course of reaching that holding, the state supreme court observed in passing that, in *Daimler*, this Court could not have addressed the unique issue of personal jurisdiction under FELA because *Daimler* dealt with claims arising abroad and FELA does not apply to "torts that occur in foreign countries, even when all parties involved are citizens of the United States." *Id.*

BNSF's inaccurate portrayal of the decision below as resting on a transnational distinction is further undercut by *Tackett v. Duncan*, 334 P.3d 920 (Mont. 2014), in which the Montana Supreme Court held that a state court lacked personal jurisdiction over a nonresident *domestic* corporation for claims not arising out of its contacts with the forum. *Id.* at 922-23. In that case, which involved a plaintiff, defendants, and events occurring

inside the United States, the court cited *Daimler* and recognized that it sets forth the appropriate standard for exercising general jurisdiction. *Id.* at 925. Not once did the court suggest that *Daimler* was applicable only to transnational cases.

Accordingly, not only is the issue not presented here, but BNSF's purported 11-1 split of authority on whether *Daimler* applies to domestic parties and claims is no split at all.

B. *Daimler* and other Fourteenth Amendment due process cases cited by BNSF do not address the question presented here, which involves whether Congress may authorize, but not require, state courts to exercise personal jurisdiction over domestic defendants for the adjudication of federal claims.

First, a number of the cases cited by BNSF involve a state court's authority to exercise personal jurisdiction over state-law claims asserted against out-of-state or foreign defendants. Both *Helicopteros*, 466 U.S. 408, and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), for example, held that a state court lacked general jurisdiction over out-of-state defendants to adjudicate state-law claims. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality op.), *World-Wide Volkswagen Corp. v. Woodson*, 444 US. 286 (1980), and *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), similarly addressed the question whether a state court had specific jurisdiction over out-of-state defendants in cases asserting state-law claims.

These cases recognize that the "Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 564 U.S. at 923. A defendant must

take some act to "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," for the exercise of personal jurisdiction to be consistent with the Fourteenth Amendment. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Restrictions on personal jurisdiction in this context "are a consequence of territorial limitations on the power of the respective States." *Id.* at 251; *see also J. McIntyre Machinery*, 564 U.S. at 883 (plurality op.) (stating that personal jurisdiction "is in the first instance a question of authority rather than fairness").

Other cases cited by BNSF involve challenges by out-of-state or foreign defendants to a *federal* court's personal jurisdiction as governed by Federal Rule of Civil Procedure 4. Rule 4 provides in relevant part that, absent a statute permitting nationwide service of process, serving a summons "establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located," that is, a defendant who could be reached by the state's long-arm statute. Fed. R. Civ. P. 4(k)(1). Because many states' long-arm statutes extend to the boundaries of what the Constitution permits, these cases often hinge on the Fourteenth Amendment's restrictions.

Daimler, for example, addressed the authority of a federal court in California to exercise general jurisdiction over a foreign defendant based on claims under state, federal, and Argentine law. Recognizing that Rule 4(k)(1) controlled the federal court's authority to exercise personal jurisdiction over the defendant, this Court looked to California's long-arm statute, which permits state courts to exercise jurisdiction "'on any

basis not inconsistent with the Constitution of this state or of the United States.'" 134 S. Ct. at 753 (quoting Cal. Civ. Proc. Code Ann. § 410.10). Solely for that reason, this Court inquired whether the exercise of personal jurisdiction over the defendant was consistent with the limits imposed by the Fourteenth Amendment. *Id.*

Similarly, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court held that a federal court in Florida could adjudicate a state-law claim against an out-of-state defendant because the Florida long-arm statute provided state courts with specific jurisdiction over the claim and such jurisdiction did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 487; *see also Walden v. Fiore*, 134 S. Ct. 1115, 1120-21 (2014) (Nevada federal court could not adjudicate a *Bivens* claim against an out-of-state defendant because applying the Nevada long-arm statute to permit personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment).

The problem for BNSF is that none of these cases, in either category, holds that the Fourteenth Amendment precludes *Congress* from conferring on state courts the power to exercise personal jurisdiction over a U.S.-based defendant to adjudicate a specific federal claim. Nor does BNSF contend that there is a split of authority among lower courts on this issue—which is the only one presented by the case.

II. No Split of Authority Exists on the Question Whether FELA Authorizes State Courts to Exercise Personal Jurisdiction in These Circumstances.

BNSF's petition for certiorari asserts that there is a split in authority among courts addressing whether "the Due Process Clause, as interpreted by *International*

Shoe and *Daimler*, controls in FELA cases filed in state court, or instead whether it is sufficient for personal jurisdiction that the defendant is doing business in the forum." Pet. 18. BNSF's assertion is wrong.

BNSF claims that three state-court decisions are inconsistent with the decision below. Each is easily reconcilable. In *Southern Pacific Transportation Co. v. Fox*, 609 So.2d 357 (Miss. 1992), the Supreme Court of Mississippi held that the state's long-arm statute did not permit a Mississippi court to exercise jurisdiction over an out-of-state FELA defendant doing business in the state. At the time, Mississippi's long-arm statute provided that defendants "doing business" in the state could only be subject to personal jurisdiction on that basis where "[t]he cause of action . . . ar[o]se from, or [was] connected with such act or transaction," and in *Fox*, the cause of action had not arisen there. *Id.* at 360. The court's holding that no jurisdiction existed was "wholly independent of constitutional due process concerns . . . flowing from *International Shoe*" and its progeny. *Id.* at 359; *see also id.* at 361 ("The question is not whether Mississippi *could* constitutionally subject Southern Pacific to personal jurisdiction, but whether it *has*, by statute or otherwise.").

Fox is fully consistent with the decision below. The Montana Supreme Court—like the court in *Fox*—recognized that "[t]he FELA does not require states to entertain suits arising under it; rather it empowers them to do so *where local law permits*." Pet. App. 15a (citing, e.g., *Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1 (1912)) (emphasis added). That Mississippi's law more narrowly limited the cases that could be brought in that state than

Montana's law is an ordinary product of state prerogative.

BNSF similarly relies on *Hayman v. Southern Pacific Co.*, 278 S.W.2d 749 (Mo. 1955), a FELA case in which a state court held that it lacked personal jurisdiction over an out-of-state defendant. Again, the court's holding rested on its interpretation of the state long-arm statute, not federal law: The court could not "hold that [state] jurisdiction was acquired" in the case. *Id.* at 751; *see also Jennings v. McCall Corp.*, 320 F.2d 64, 72 (8th Cir. 1963) (citing *Hayman* for the proposition that "the Missouri courts require something more than minimum compliance with federal due process to constitute doing business such as will make a foreign corporation amenable to state jurisdiction"); *cf. Besse v. Mo. Pac. R.R. Co.*, 721 S.W.2d 740, 741 (Mo. 1986) (stating that FELA "[s]uit may be brought in any federal court of the district in which the defendant does business, or in any state court where state venue statutes permit").

Norfolk Southern Railway Co. v. Maynard, 437 S.E.2d 277 (W. Va. 1993), the third case cited by BNSF, is even further afield. In that FELA case, the Supreme Court of West Virginia considered whether a railroad defendant was subject to personal jurisdiction in state court. *Id.* at 283-84. The trial-court record was inadequate to enable the court to determine whether the activities of the defendant's subsidiary were "sufficient to hold the parent, Norfolk Southern Railway, to be doing business" in the state, as required to satisfy FELA's "doing business" prong. *Id.* at 284. The supreme court ordered that the railroad was entitled on remand to a hearing on that question. It discussed *International Shoe* and its progeny in dicta to describe the scope of the

state's long-arm statute, and it recognized that whether suit was permitted under its long-arm statute was an issue distinct from the question whether the defendant was "doing business" in West Virginia, as FELA uses that term. *Id.* at 280-81 (citing *Hodge v. Sands Mfg. Co.*, 150 S.E.2d 793 (W. Va. 1966)). That discussion aligns with Montana's determination here that FELA confers personal jurisdiction on state courts but does not require states to exercise it where prohibited by state law.

Not only are the three state-court decisions on which BNSF relies consistent with the Montana Supreme Court's decision here, but *MacKinnon v. St. Louis Southwestern Railway Co.*, 518 So.2d 89 (Ala. 1987), is not—as BNSF contends—at odds with those decisions. BNSF describes *MacKinnon* as holding that "in a FELA case, it is sufficient for personal jurisdiction that the defendant is doing business in the forum state." Pet. 18. In fact, however, the plaintiff in *MacKinnon* acknowledged that FELA plaintiffs attempting to enforce their rights in a state court based on the fact that the defendant was doing business in the state could do so only "in the absence of a [state] statute precluding jurisdiction." 518 So.2d at 93. There is no indication in the opinion that the defendant railroad asserted that state law forbade bringing the suit.[2]

III. The Montana Supreme Court's Decision Is Correct.

A. As the Montana Supreme Court recognized, this Court has on numerous occasions reviewed FELA claims brought in state and federal court that—like this case—

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[2] *Imm v. Union Railroad Co.*, 289 F.2d 858 (3d Cir. 1961), on which a BNSF amicus relies (Nat'l Ass'n of Mfrs. Br. 16), is inapplicable for the more basic reason that it addressed subject-matter jurisdiction, not personal jurisdiction.

involved out-of-state plaintiffs, defendants, and events. This Court has never questioned that the courts had personal jurisdiction over the defendants. In *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), for example, two railroads argued that the adjudication of FELA claims against them in Missouri state court, where the plaintiff lived, would violate the Fourteenth Amendment. *Id.* at 285. This Court held that, although one of the railroads was not properly sued in Missouri because it was not running trains in the state, the other railroad—which owned and operated railroad lines in Missouri and was licensed to do business there—was properly sued in the state. *Id.* at 287; *see also McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934) (holding that an Alabama state court could not refuse to adjudicate a FELA claim between a Tennessee plaintiff and a foreign defendant involving an injury that occurred in Tennessee).

Moreover, this Court has repeatedly concluded that the inconvenience and cost to defendants of defending FELA suits in any state where they do business was contemplated by Congress and is permissible. In *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44 (1941), this Court considered whether a "state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting" a FELA claim in a federal court of New York. *Id.* at 47. The plaintiff in that case lived in Ohio, the accident giving rise to the FELA claim occurred there, and the defendant was doing business there. This Court held that the state court could not enjoin the federal-court action on the ground that the federal-court action would result in "inequity based on cost, inconvenience or harassment." *Id.* at 54. "A privilege of venue granted by the legislative body

which created this right of action cannot be frustrated for reasons of convenience or expense." *Id.*

The following year, this Court held in *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698 (1942), that a Tennessee state court could not enjoin a Missouri state court from adjudicating a FELA claim on grounds of inequity or harassment, even though the claim was brought by a Tennessee resident for injuries sustained in Tennessee. The Court held that the "specific declaration" in FELA "that the United States courts should have concurrent jurisdiction with those of the several states and the prohibition against removal point clearly to the conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant" that is doing business in the forum state. *Id.* at 702; *see also, e.g.*, *Pope v. Atl. Coast R. Co.*, 345 U.S. 379, 383, 387 (1953) (holding that a Georgia state court could not enjoin on grounds of oppressiveness or inequity an Alabama state court from adjudicating a FELA claim that arose in Georgia and that was asserted by a Georgia resident).

BNSF dismisses these cases, contending that they do not use the term "personal jurisdiction" and, in some cases, pre-date *International Shoe*. Pet. 19-20. But just recently, in *J. McIntyre Machinery*, a plurality of the Court suggested that Congress could exercise its power to confer personal jurisdiction on state courts in a manner similar to the approach used in FELA. *J. McIntyre Machinery* held that a state court lacked specific jurisdiction over a foreign corporation to adjudicate a state products liability suit. 564 U.S. at 877 (plurality op.). As the plurality opinion explained, however, it might "be that, assuming it were otherwise

empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts" for such claims. *Id.* at 885. The plurality's acknowledgment is consistent with the view that Fourteenth Amendment limits on state court personal jurisdiction rest in the first instance on the territorial limits of state authority, and Congress's authority is not limited by state boundaries. And this Court in other contexts has acknowledged that Congress may authorize states to take action that, in the absence of such authorization, would be unconstitutional. *See, e.g.*, *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003) (stating that "Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce").

BNSF also contends (at 21) that the decision below is inconsistent with *Mondou* (*Second Employers' Liability Cases*), 223 U.S. 1, which stated that in crafting FELA, Congress did not attempt "to enlarge or regulate the jurisdiction of state courts." *Id.* at 56. The Montana Supreme Court, however, recognized that FELA permits—but does not require—state courts to exercise jurisdiction over FELA claims, so long as the state jurisdictional provision does not single out FELA claims for discrimination. The decision below is thus consistent with *Mondou*.

B. If BNSF were correct that 45 U.S.C. § 56 addressed only proper venue, not personal jurisdiction, the FELA claims in this case could not be brought in either the Montana state court or a Montana federal court, even if the plaintiffs here had been Montana residents.

As discussed above, Federal Rule of Civil Procedure 4 governs the federal courts' personal jurisdiction over

defendants. Under BNSF's theory, a FELA plaintiff residing in Montana but injured elsewhere could not sue in the U.S. District Court for the District of Montana and rely on Rule 4(k)(1)(A), which provides that a summons may establish personal jurisdiction when the defendant is within reach of the forum state's long-arm authority. That plaintiff also could not rely on Rule 4(k)(1)(C), which permits the exercise of personal jurisdiction when "authorized by a federal statute." *See also* 1993 Advisory Committee Note, Fed. R. Civ. P. 4 (explaining that federal legislation "may provide for nationwide or even world-wide service of process in cases arising under particular federal laws").[3]

That outcome—in which an injured employee cannot sue a railroad in either state or federal court in a state where the railroad is doing business—would render illusory an employee's right to "find the corporation at any point or place or State where it is actually carrying on business, and there lodge his [FELA] action." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted). That BNSF's theory would support such an outcome underscores that it cannot be correct.

Indeed, it appears that even BNSF disagrees with the implications of its theory for federal-court actions: BNSF told the Montana Supreme Court that FELA gives a plaintiff "the right to sue in any *federal* court where BNSF does business." BNSF Reply in Mont. S. Ct. 17. That statement is true only if 45 U.S.C. § 56

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[3] As this Court recognized in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987), it has not directly addressed whether and to what extent the Fifth Amendment to the U.S. Constitution may limit Congress's power to confer on a federal court personal jurisdiction over a defendant who lacks contacts with the state in which the federal court sits. BNSF has not, in any event, raised an argument based on the Fifth Amendment.

confers personal jurisdiction on federal courts. We agree with BNSF that it does. And if that is correct, the state court likewise may exercise jurisdiction in this case.

C. BNSF contends that state courts will be flooded with suits asserting FELA and other claims against defendants with no connection to the state other than ongoing business unrelated to the claims. As discussed above, however, the Montana Supreme Court did not hold that its courts could adjudicate any and all claims against a defendant on the ground that it is doing business in the state. Rather, courts may adjudicate only FELA claims against common-carrier railroads engaged in interstate commerce in such circumstances, and even then, only so long as state law permits the claims to be brought there. *See, e.g.*, *State of Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950) (holding that a state may deny access in its courts to individuals bringing FELA claims "if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially").

BNSF also contends that under the decision below, it and other railroads will "be forced to defend cases in Montana when, as here, the site of the injury, the relevant evidence, and the witnesses are all located hundreds of miles away." Pet. 24; *see also id.* 25 (warning that railroads "will face hundreds more out-of-state FELA lawsuits"). To the extent BNSF claims unfairness that it can be sued on FELA claims wherever it does business, that argument is best addressed to Congress. Congress considered the wisdom of more narrowly limiting employees' choice of forum and, indeed, did so in FELA's early years. It later determined that such limitations were inappropriate. By permitting FELA claims in a state court in any jurisdiction where a

defendant is doing business, and by making those claims non-removable, Congress intentionally gave employees broad discretion in choosing where to bring their claims. *See* 45 U.S.C. § 56; 28 U.S.C. § 1445(a).

In any event, concerns that individual workers asserting FELA claims will seek out distant fora for their suits is overblown. As a general matter, litigating in distant states would burden workers much more than railroads. The cases here—in which both plaintiffs live in states adjoining Montana, where they filed suit—demonstrate that BNSF's portrayal of injured workers engaging in nationwide forum-shopping is off the mark.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

This Court's holding in *Daimler AG v. Bauman* is under assault. 134 S. Ct. 746 (2014). The Montana Supreme Court explicitly refused to apply *Daimler*, and it created direct splits with other courts, when it authorized personal jurisdiction over defendants that are not at home in Montana in FELA cases that do not arise in Montana. Respondents attempt to evade these stark conflicts by denying that the Montana Supreme Court meant what it said about *Daimler*, by obfuscating the question presented, by ignoring FELA's plain text, and by misrepresenting this Court's FELA precedents.

The judgment below is egregiously wrong and reversing it will affect more than 170 pending cases in which railroads are subject to abusive and flagrantly unconstitutional forum-shopping.

I. The Montana Supreme Court's Opinion Is Unfaithful To *Daimler* And Splits With Multiple Other Courts

The Montana Supreme Court could not have found general personal jurisdiction over BNSF without explaining why *Daimler*'s at-home rule did not apply. In offering that explanation, the Montana Supreme Court created a split on whether *Daimler* is limited to transnational cases, and it deepened a split on whether FELA authorizes state courts to exercise personal jurisdiction over out-of-state railroads where the Due Process Clause would forbid it. These splits are real and they warrant this Court's review.

A. The Montana Supreme Court's Reading Of *Daimler* Creates A Deep Split

Respondents first contend that the Montana Supreme Court's opinion is not really about general personal jurisdiction "as that term is used in this Court's case law," because the holding below is limited to FELA claims. Br. in Opp. 8–9. But that only highlights the Montana Supreme Court's confusion about this Court's general personal-jurisdiction jurisprudence, which is grounded in the Due Process Clause and does not change based on the state or federal cause of action asserted.

Next, Respondents refuse to defend the Montana Supreme Court's holding that *Daimler* is "factually ... distinguishable," Pet. App. 15a, based on its international context, *see* Pet. App. 11a. This is surprising, because Respondents *asked* the Montana Supreme Court to reach that very conclusion. *See* Pls.' Consolidated Answer Br. in Mont. S. Ct. 34, 36 (arguing that "[e]ven a cursory reading of *Daimler* reveals that the Court's focus was directly on the 'transnational context,'" and "these cases simply do not implicate any of the 'risks to international comity' ... that the Court found to be of such grave concern in *Daimler*").

Instead, Respondents state that the Montana Supreme Court did not actually distinguish *Daimler* based on its transnational facts and thereby create a massive 11-1 split. Br. in Opp. 9–10. Respondents' attempt to walk back the holding they asked for and received is specious. The opinion below expressly states that *Daimler* addressed "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States," and as such, *Daimler* does not apply to cases under FELA,

which "does not apply to torts that occur in foreign countries." Pet. App. 11a. Future courts will apply the actual language and holding of the Montana Supreme Court's decision, not Respondents' narrowing construction of it.

The Montana Supreme Court's fallacious distinction of *Daimler* is not cured by its opinion two years earlier in *Tackett v. Duncan*, 334 P.3d 920 (Mont. 2014). *Contra* Br. in Opp. 9–10. The *Tackett* court had no reason to discuss the reach of *Daimler*'s holding on general jurisdiction, because the question in *Tackett* was whether the trial court "lacked specific jurisdiction." 334 P.3d at 926. This Court should grant certiorari to resolve the split on the scope of *Daimler* and to prevent artificial distinctions from resurrecting the "doing business" test for general personal jurisdiction.

B. Courts Are Starkly Divided Over The Meaning Of FELA

There is no merit to Respondents' assertion that 45 U.S.C. § 56 authorizes state courts to exercise personal jurisdiction over out-of-state railroads in FELA cases, or that there is no conflict on this question. Br. in Opp. 1–2. The split between the Montana Supreme Court and multiple other courts over FELA's meaning is stark, and it produces conflicting jurisdictional outcomes depending on the forum.

The Montana Supreme Court held that personal jurisdiction in FELA cases requires affirmative answers to two questions: (1) Is the defendant "doing business" in the forum state, and (2) Has the plaintiff satisfied the forum's long-arm statute? Pet. App. 13a, 17a. According to that court, if the answer to both questions is yes, then there is no need for the at-home analysis under the Due Process Clause, *see* Pet. App.

18a–19a, because "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business,'" Pet. App. 12a. The Alabama Supreme Court agrees: It holds that so long as the defendant is "doing business" in Alabama and can satisfy the Alabama long-arm statute, no consideration of due process is required. *MacKinnon v. St. Louis Sw. Ry. Co.*, 518 So. 2d 89, 93 (Ala. 1987).

But other courts do not agree. In sharp contrast to the Montana Supreme Court's holding that "FELA confer[s] [personal] jurisdiction to state courts," Pet. App. 9a, the Mississippi Supreme Court holds that "Section 56 speaks to venue of actions in federal courts, not personal jurisdiction in state courts," and that "[n]othing in the act addresses the matter of personal jurisdiction in the state court." *S. Pac. Transp. Co v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992). And whereas the Montana Supreme Court interpreted "the 'concurrent jurisdiction' conferred upon the state and federal courts" by Section 56 to include "personal jurisdiction," Pet. App. 14a, *Fox* holds that "concurrent federal and state jurisdiction ... refers to subject matter jurisdiction." 609 So. 2d at 362.

Similarly, the Missouri Supreme Court holds that Section 56 "refers to suits in the United States District Courts and is not applicable" to cases in state court. *Hayman v. S. Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955). The Missouri Supreme Court thus holds that, even where the railroad is doing business in the forum and the long-arm statute is satisfied, "the state must acquire jurisdiction over the defendant" under due-process principles. *Id.* The West Virginia Supreme Court of Appeals likewise holds that "a FELA plaintiff is limited" by "the requirements for *in personam* jurisdiction outlined in *International Shoe*." *Norfolk S. Ry.*

Co. v. Maynard, 437 S.E.2d 277, 280–81 (W. Va. 1993).

Respondents contend that these state-court opinions are irrelevant because they interpreted state long-arm statutes, not FELA. Br. in Opp. 13–15. That is misdirection. These courts hold that FELA does not address personal jurisdiction in state courts, and that they apply this Court's due-process analysis (which is now *Daimler*'s at-home rule) before accepting general personal jurisdiction, whereas the Montana Supreme Court held that FELA makes *Daimler* completely inapplicable.

The fact that these courts agree on the unremarkable proposition that a plaintiff must also satisfy the state long-arm statute to bring a FELA claim, *see* Br. in Opp. 2, does not negate the obvious and important split over the question presented here: Whether FELA confers general personal jurisdiction on state courts even where the Due Process Clause and *Daimler*'s at-home rule would forbid it.

II. The Montana Supreme Court's Opinion Is Egregiously Wrong

A. Respondents grievously misread Section 56 in asserting that it permits "an expansive set of federal *and state* courts to serve as proper venues *and to exercise personal jurisdiction* over railroads in FELA cases." Br. in Opp. 1 (emphasis added). Respondents' reliance on *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 50 (1941), is utterly misplaced: *Kepner* held definitively that Section 56 "establishes *venue* for an action in the *federal courts*." 314 U.S. at 52 (emphasis added). The statute has nothing to do with personal jurisdiction in a state court, and no case from this Court has ever held otherwise.

As for Section 56's "concurrent" jurisdiction clause, this Court long ago explained that it refers only to state courts' subject-matter jurisdiction, and does not "enlarge or regulate the jurisdiction of state courts." *Second Employers' Liability Cases*, 223 U.S. 1, 55–56 (1912). Respondents do not attempt to defend the Montana Supreme Court's holding that "concurrent" jurisdiction encompasses personal jurisdiction, Pet. App. 14a, a holding that is contrary to this Court's decisions dating back *centuries*, Pet. 22. Respondents' unwillingness to defend the textual basis invoked by the Montana Supreme Court to support its interpretation of Section 56 speaks volumes.

Indeed, Respondents never give meaningful attention to the text of 45 U.S.C. § 56. Instead, they resort to the least-persuasive type of legislative history—floor statements by a single Senator that were mentioned in *Kepner*. Br. in Opp. 3–4, 19. The attempt to substitute legislative history for textual analysis is compelling evidence that the Montana Supreme Court's statutory interpretation (and thus, its judgment) is wrong. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

Respondents also contend that this Court has endorsed the Montana Supreme Court's interpretation of Section 56. Br. in Opp. 15–17. As BNSF already has demonstrated, Pet. 19–20, this argument is spectacularly wrong: Not one of the cases cited by Respondents discussed personal jurisdiction under the Due Process Clause. The defendants in *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), raised a series of objections, including based on "an undue burden on interstate commerce ... and

the Fourteenth Amendment," *id.* at 285, but this Court's opinion was based solely on precedents applying the Dormant Commerce Clause, *id.* at 287–88. The defendant in *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230 (1934), objected that the state court lacked jurisdiction under state law, *id.* at 230–31. The holdings in *Kepner*, 314 U.S. 44, *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698 (1942), and *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), all concerned state courts' equitable authority to enjoin harassing litigation, as Respondents concede. Br. in Opp. 16–17.

Moreover, all but one of these cases pre-dated *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which addressed the perceived injustice of an injured railroad employee "be[ing] forced to litigate in a distant forum," Br. in Opp. 3, when it created *specific* personal jurisdiction, abrogating the formalistic territorial rules of the prior era. *See Daimler*, 134 S. Ct. at 753–54. Personal-jurisdiction cases predating *International Shoe* are not entitled to reliance today. *See id.* at 761 n.18. Moreover, any "drive-by jurisdictional rulings" in these cases "have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). That rule is particularly forceful in the context of a waivable right like personal jurisdiction. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

Respondents also contend that Section 56 must be read to confer personal jurisdiction in a *federal* court where the railroad is doing business, and supposedly it must therefore also confer personal jurisdiction on state courts. Br. in Opp. 18–20. That is a complete *non sequitur*. Section 56 describes where a case may be brought "in a district court of the United States."

45 U.S.C. § 56. Thus, even if Respondents were correct that this provision confers personal jurisdiction on federal courts, it would not matter here, because this case is about personal jurisdiction in *state* courts. Moreover, Respondents are not correct that FELA confers personal jurisdiction in federal courts, which is instead governed by Federal Rule of Civil Procedure 4(k)(1) and the constraints of the Fifth Amendment. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104–06 (1987).[1]

B. Even if the Montana Supreme Court's construction of FELA were somehow correct, the judgment below must *still* be reversed because Congress does not have the constitutional "power to confer personal jurisdiction on state courts" where the Due Process Clause denies it. *Contra* Br. in Opp. 17. The Montana Supreme Court's contrary conclusion is extraordinary and *by itself* deserves this Court's review.

Respondents contend that *Daimler* did not address whether Congress can override the Fourteenth Amendment, and that there is no split on that issue. Br. in Opp. 12. But "[t]he notion that some things 'go without saying' applies to [law] just as it does to everyday life." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). A federal statute plainly cannot create personal jurisdiction in a state court notwithstanding the limitations of the Due Process Clause, and this Court has never needed to enforce that self-evident proposition—until now.

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[1] BNSF did not concede below that a Montana federal court would have jurisdiction in this case, *contra* Br. in Opp. 19, a question that was not presented. In context, BNSF's reply brief to the Montana Supreme Court acknowledged Section 56's conferral of a right to federal *venue*.

Respondents posit that a plurality of this Court "acknowledge[d]" the power of Congress to alter state courts' personal jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011). Br. in Opp. 17–18. That is preposterous. Just two sentences after the passage Respondents quote, the *Nicastro* plurality was clear that it referred to a hypothetical statute "authoriz[ing] jurisdiction in a *federal court* in New Jersey." 564 U.S. at 885–86 (emphasis added). The *Nicastro* plurality opinion stands strongly for the *opposite* of the Montana Supreme Court's holding here: Only state legislatures—not Congress—have the power to alter state courts' personal jurisdiction. 564 U.S. at 884 ("personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign analysis," and "the United States is a distinct sovereign"). And they may do so only subject to the Due Process Clause.

Respondents finally argue that Congress can "authorize state regulations that burden or discriminate against interstate commerce." Br. in Opp. 18 (quoting *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003)). That is true but irrelevant: Congress's exclusive power to regulate interstate commerce can be delegated to states. But this Court held in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732–33 (1982), that Congress does *not* have the very different and much more radical power to authorize states to violate the Fourteenth Amendment. Congress could not by statute empower states to deny marriages to same-sex couples, *cf. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), or to enact race-based admission quotas for public universities, *cf. Gratz v. Bollinger*, 539 U.S. 244 (2003). It similarly cannot authorize state courts to exercise personal jurisdiction that the Due Process Clause forbids by subjecting defendants to "the burdens of litigating in a distant or inconvenient forum."

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). Respondents do not even mention *Hogan*, let alone explain the source of Congress' supposed authority to authorize violations of the Fourteenth Amendment.

The decision below rests on both a dreadful misreading of a federal statute as well as an unprecedented and distorted claim about Congress's power to override the Constitution. Those holdings warrant review.

III. This Case Is Extremely Important, And A Grant, Vacate, And Remand Will Not Suffice

Resolution of this case is necessary to defend the integrity of this Court's holdings and to prevent the ongoing deprivation of constitutional rights by the Montana Supreme Court. Unless reversed by this Court, the decision below will provide a blueprint for courts to limit *Daimler* to its facts or to make exceptions based on the cause of action asserted. In FELA cases alone, the opinion will have an enormous warping impact on the railroad industry in Montana and multiple other states. Several hundred FELA cases are filed nationwide every year, and under the Montana Supreme Court's rule they can be filed anywhere a railroad is "doing business."

As described by amicus curiae the Association of American Railroads (at 9), a reversal from this Court of the decision below will have an immediate and potentially dispositive impact in at least 170 pending cases where plaintiffs have pleaded FELA claims in state courts that are not the railroad's state of incorporation or principal place of business, and where the claim did not arise in the state. Those facts, which Respondents do not dispute, render hollow their con-

tention that concerns about forum-shopping are "overblown." Br. in Opp. 21. Just since BNSF filed its petition for certiorari, plaintiffs have served on BNSF a new FELA suit in Montana state court having no connection to Montana, bringing BNSF's total in Montana to 33 (Pet. 25), and another new suit in Illinois state court that has no connection to Illinois.[2] Only this Court can stop the proliferation of these plainly unconstitutional magnet jurisdictions.

To end the abuse, this Court must grant certiorari, not hold this case for any other. The Court has pending a number of petitions for certiorari raising questions related to personal jurisdiction. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, No. 16-466; *Koninklijke Philips N.V. v. Washington*, No. 16-559; *Mylan Pharm. Inc. v. Acorda Therapeutics Inc.*, No. 16-360. But none of those petitions involves *general* personal jurisdiction, the claim that a federal statute confers personal jurisdiction in state courts, or the occasion to consider Section 56, which is the engine of FELA litigation against the railroad industry. Thus, even were the Court to grant certiorari in one of those cases and rule in favor of the defendant, then grant, vacate, and remand this case, it is highly unlikely that the Montana Supreme Court would reverse its judgment. Without review in this case, the Montana Supreme Court will continue to deny due-process rights, and the Montana state courts will become an increasingly powerful epicenter for litigation having nothing to do with that state.

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[2] *See Watts v. BNSF Ry. Co.*, No. DV 15-0289 (Mont. Dist. Ct.); *Uhlman v. A.W. Chesterton Co.*, 2016L-001584 (Ill. Cir. Ct. Madison Cnty.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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RECORD AND BRIEF
MOTION FILED
OCT 28 2016

No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

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BNSF RAILWAY COMPANY,

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KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed pursuant to Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has not consented.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter authorities. AAR seeks leave to file a brief

[1] The letter expressing consent has been filed with the Clerk of the Court.

amicus curiae only when the case presents an issue of great significance to the railroad industry as a whole and in those instances such requests have been granted.[2]

This case arises under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. Hundreds of FELA suits are filed against all major railroads each year. The railroad industry has a strong interest in assuring that lower courts do not improperly expand the liability of, nor otherwise disadvantage, railroads under FELA.

In this case, the Montana Supreme Court ignored recent holdings of this Court, and ruled that in FELA suits Montana courts may exercise general personal jurisdiction over railroads that are neither incorporated nor headquartered in Montana. The court held that as long as a nonresident railroad is doing business in the state, Montana may exercise personal jurisdiction—even if the cause of action did not arise in Montana. This holding abrogates the due process rights of FELA defendants and confers a serious and unwarranted disadvantage on railroad defendants.

AAR hopes to bring a broad, industry-wide perspective to the issue before the Court. The perspective and concerns of an industry as a whole can be different from that of an individual litigant. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel,

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[2] *E.g., Bolen v. BNSF Ry.*, 136 S. Ct. 1660 (2016); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007).

an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

AAR has an interest that goes beyond assisting the petitioner in obtaining relief from an erroneous decision, to ensuring that the constitutional rights of railroads are enforced throughout the nation's state courts.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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October 28, 2016

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies and the courts.[1]

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a negligence statute enacted over a century ago. Under FELA, railroad employees who are injured on the job may seek compensation from their employing railroad. FELA differs fundamentally from the workers' compensation systems that today cover virtually all other U.S. industries. Under a workers' compensation system, the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. In contrast, liability under FELA is conditioned on proving that the employer's negligence caused the injury, and compensation is reduced to the extent the injury was caused by the employee's negligence.

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[1] As required by Rule 37.2(a), counsel for *amicus curiae* AAR has timely notified counsel of record for the parties of AAR's intent to file this brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

FELA presents unique issues and problems for railroads. Each year hundreds of FELA lawsuits, like the case below, are brought against AAR member railroads. In each of these cases, the parties must litigate over the fact-specific questions of fault, causation, and damages. The railroads spend hundreds of millions of dollars annually in the defense and payment of FELA claims.

In this case, the Montana Supreme Court held that Montana courts may exercise general personal jurisdiction over FELA defendants as long as the defendant is doing business in the state, even though Montana is neither the defendant's place of incorporation nor principle place of business. This holding ignores recent decisions of this Court. It is of great concern to AAR's members since it subjects them to suit in numerous jurisdictions where they are neither "at home" nor where the cause of action arose. The holding below sets railroads apart as a class of defendants that are not entitled to the protection of the Due Process Clause of the Fourteenth Amendment.

It is of utmost importance to AAR's members that this Court provide guidance to state courts on the proper exercise of personal jurisdiction in FELA cases.

SUMMARY OF THE ARGUMENT

The Montana Supreme Court held that Montana courts may exercise general personal jurisdiction over railroads that are defendants in FELA cases as long as the railroad is doing business in the state. That ruling ignored prior decisions of this Court that established the constitutional limitations on personal jurisdiction over corporate defendants. Those decisions require that when the cause of action does not arise in the

forum state personal jurisdiction may be exercised only where the corporation is "at home." Other than under exceptional circumstances, corporations are at home in their state of incorporation or principle place of business. The court below held that this Court's decisions do not apply to FELA case, and, in any event, that when Congress enacted FELA it designated railroads as being "at home" wherever they do business. The court was wrong.

In FELA cases, railroads frequently are sued in states where the cause of action is not related to the railroads activities in the forum state and where they are neither incorporated nor have their principle place of business. The four largest freight railroads and Amtrak each do business in over 20 states, and under the ruling below, would be subject to personal jurisdiction in each of those states. The Montana court's conclusion that such a result has been approved by this Court is incorrect. This Court has never held that state courts have general personal jurisdiction in FELA cases wherever a railroad does business.

Nor was the court below correct when it held that Section 56 of FELA confers personal jurisdiction on state courts wherever a FELA defendant is doing business. In 1910 Congress amended Section 56 to expand federal court venue in FELA cases. It also clarified that state courts have concurrent subject matter jurisdiction in FELA cases, a provision Congress deemed necessary to address an early state court holding that state courts did not have subject matter jurisdiction in FELA cases. However, the statutory language and legislative history make clear that Section 56 does not address personal jurisdiction in FELA cases. Personal jurisdiction in FELA cases

remains subject to the requirements of the Due Process Clause as determined by this Court.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE RULING BELOW, WHICH DEPRIVED RAILROAD DEFENDANTS OF THEIR CONSTITUTIONAL RIGHTS, WILL HAVE NATIONWIDE IMPLICATIONS

1. The Court Below Ignored This Court's Decisions on the Constitutional Limitations on Personal Jurisdiction.

In 1908, Congress enacted the Federal Employers' Liability Act (FELA) as a national workplace compensation scheme that governs the U.S. railroad industry. 45 U.S.C. §§51-60.[2] What Congress could not and did not do when it enacted FELA is override the constitutional rights of defendants. Nonetheless, the Montana Supreme Court has ruled that Congress did just that. That decision was incorrect, and because of its far-reaching implications, should be reviewed and reversed by this Court.

FELA is based on tort concepts. In order for railroad employees to receive compensation for workplace injuries they must prove their employer's negligence caused the injury in whole or in part. 45 U.S.C. §51. If the employer can prove the employee's negligence contributed to the injury, compensation is reduced in proportion to the employee's negligence. 45 U.S.C. §53. If a railroad and an injured employee cannot reach an agreement over compensation, the employee's recourse is to file a FELA lawsuit against the

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[2] Under the Jones Act, 46 U.S.C. §30104, the maritime industry also is covered by FELA.

railroad, in which the employee must prove all the elements of a negligence action. *Fulk v. Ill. Cent. R.R.*, 22 F.3d 120, 124 (7th Cir. 1994).

While the number of injuries suffered by railroad employees has greatly decreased over the past few decades, railroads continue to face hundreds of FELA suits each year.[3] Substantive federal law governs those lawsuits. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Subject matter jurisdiction over a FELA suit exists in either state or federal court. 45 U.S.C. §56. However, as with all other causes of action, in order to hear a FELA suit, in addition to subject matter jurisdiction, a court must have personal jurisdiction over the parties. As this Court has instructed, a court's exercise of personal jurisdiction is subject to the limitations imposed by the U.S. Constitution. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

The situs of FELA lawsuits has long been a contentious issue. It is widely acknowledged that plaintiffs often will seek out forums believed to be favorable for plaintiffs, even at apparent inconvenience to themselves. *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, 707 (1942) (Jackson, J. concurring). Historically, attempts to find favorable jurisdictions have been a prominent feature of FELA litigation, with plaintiffs often bringing suit in jurisdictions with little apparent connection to the underlying litigation. *See e.g., Matthews v. N. J. Transit Corp.*, 1995 WL 217493

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[3] Injuries to railroad employees have decreased by 84% since 1980, and by 47% since 2000. http://safetdata.fra.dot.gov/office of safety/publicsite/summary.aspx (2011-2015); Federal Railroad Administration, *Railroad Safety Statistics Annual Report*, 1997-2010, Tables 1-2, 4-1; Federal Railroad Administration, *Accident/Incident Bulletin*, 1980-1996, Tables 13, 36.

(S.D. N.Y. 1995) (FELA suit filed in New York where plaintiff was a New Jersey resident, was injured in New Jersey and all expected witnesses resided and worked in New Jersey); *Hayes v. Chicago, Rock Island & Pac. R.R.*, 79 F.Supp. 821 (D. Minn. 1948) (litigation involving eight plaintiffs who brought suit in Minnesota, one of whom sustained injury in Texas, one in Illinois, and six in Oklahoma); *Palumbo v. N. J. Transit Rail Ops.*, 2003 WL 256939 (Pa. Commw. Ct. 2003) (plaintiff, who brought suit in Pennsylvania, was injured in New Jersey, resided in New Jersey, and all witnesses were located in New Jersey); *Norfolk & W. Ry. Co. v. Tsapis*, 400 S.E.2d 239 (W.Va. 1990) (litigation involving 818 plaintiffs who brought suit in a single West Virginia County, of whom 644 were not West Virginia residents); *Norman v. Norfolk & W. Ry. Co.*, 323 A.2d 850 (Pa. Super. 1974) (plaintiff, a Kentucky resident who was injured in Kentucky, brought suit in Pennsylvania).

The case below is such a case. Two railroad employees who did not reside, nor allege injury, in Montana brought suit in Montana state court against petitioner BNSF Railway. While BNSF operates in Montana, and 27 other states, it is not incorporated in Montana, nor does it have its principle place of business in Montana. Pet. at 6-7. The Montana Supreme Court held that Montana courts have personal jurisdiction over nonresident railroads like BNSF in FELA cases, even if the cause of action does not arise from the railroad's activities in the state. Pet. App. 1a-19a.

That ruling is inconsistent with this Court's holdings regarding the constitutional limitations on general personal jurisdiction under the Due Process Clause of the Fourteenth Amendment. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires*

Ops., S.A. v. Brown, 131 S. Ct. 2846 (2011). In those cases, this Court has held that "a court may assert general jurisdiction over foreign (sister-state or foreign country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State," *Daimler*, 134 S.Ct. at 754 (quoting *Goodyear*, 131 S. Ct. at 2851), and that absent exceptional circumstances, "[w]ith respect to a corporation, the place of incorporation and principle place of business are 'paradig[m] . . . bases for general jurisdiction.'" *Id.* at 760.

The court below held that those decisions are inapplicable to FELA. The Montana Court distinguished *Daimler* because it "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. However, *Daimler* addressed the requirements of the Due Process Clause of the Fourteenth Amendment, requirements that are no less applicable when a lawsuit arises under FELA or because the defendant is a railroad. Noting that this Court "did not address personal jurisdiction under the FELA" in *Daimler*, the Montana court did not explain why a different constitutional analysis for personal jurisdiction would apply to suits brought under FELA. Instead, in direct contradiction to *Daimler*, the court established its own test, holding that "BNSF does business in Montana; therefore, under the FELA, Montana courts have general personal jurisdiction over BNSF." Pet. App. 15a.

That concept has been rejected by this Court. "A corporation's continuous activity of some nature within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Goodyear*, 131 S.Ct. at 2855 (internal quotations omitted). In *Daimler*, this Court reaffirmed

that to assert general jurisdiction over a corporation on the grounds that it "engages in a substantial, continuous, and systematic course of business" would be "unacceptably grasping." 134 S.Ct. at 761. The fact that a cause of action arises under FELA does not create an exception to the protections provided to all litigants by the Constitution.

2. The Question Presented Has Nationwide Implications for Railroads.

The decision below merits review because it has implications beyond just the State of Montana and BNSF. It will impact all large railroads, which face FELA litigation throughout the nation. Large railroads conduct operations in numerous states: BNSF in 28; Union Pacific in 23; CSX in 23 (and the District of Columbia); and Norfolk Southern in 21. In addition to owning tracks, in many of those states large railroads operate rail yards (where traffic is interchanged and trains are broken down and reassembled) and many other facilities; they also originate and terminate substantial amounts of traffic in many of the states in which they operate. Amtrak, which provides intercity passenger rail service nationwide, operates in 46 states. While Amtrak operates over tracks owned by the freight railroads over most of its routes, it serves hundreds of stations located throughout its network. As a national operator, Amtrak solicits business all over the country.

This Court has held that business activities of that nature are not sufficient to give a state's courts general personal jurisdiction over a corporation. Nonetheless, the only limitation the court below seemed to put on its power to hale a nonresident railroad into Montana courts is that the railroad does business in the state.

That test hardly comports with the requirements of due process which focuses on providing defendants with predictability and "minimum assurances" about where they can be sued. *Daimler*, 134 S.Ct. at 762. This Court has explained that "[a] corporation that operates in many places can scarcely be deemed at home in all of them," *id.* at 762 n. 20, yet under the Montana court's formulation, BNSF and other large railroads likely would be found at home in every state in which they operate. If that were the law, there would be no way for a railroad to predict where on its system it might be sued in FELA cases. As Judge Baugh recognized in granting BNSF's motion to dismiss respondent Nelson's suit, if "BNSF is 'at home' in Montana, it is also 'at home' in most, if not all, of the 27 other states in which it operates." Pet. App. 39a.

This is not merely speculation; it is a reality of FELA litigation that underscores the importance of granting the petition. BNSF has advised this Court that it is the defendant in 32 FELA cases in Montana state court—in none of them did the cause of action arise in Montana. Pet. at 24-25. And that is just the tip of the iceberg. Disregard of the constitutional requirements of personal jurisdiction set forth in *Daimler* and *Goodyear* is occurring in state courts nationwide in FELA cases.

AAR's large freight members have advised AAR that at least 170 FELA cases are pending against them in the courts of states that are neither (1) the railroad's state of incorporation; (2) the railroad's principle place of business; nor (3) the state where the alleged injury giving rise to the suit occurred. These suits are spread throughout the country, although a few states, like Montana, Missouri, Illinois and Pennsylvania, appear

to be magnet jurisdictions for FELA litigation against nonresident railroads. This Court's resolution of the question presented in the petition would resolve personal jurisdiction in each of these case.

In particular, addressing the question presented would provide guidance to state courts around the country on when they can properly assert personal jurisdiction in FELA cases. Unless, as the Montana Supreme Court contends, the *Daimler* and *Goodyear* holdings do not apply to FELA cases, then there are many FELA suits pending in state courts throughout the nation where the court has not properly exercised personal jurisdiction over the railroad defendant.

3. Congress Did Not Grant Personal Jurisdiction Over Railroads in FELA Cases to Courts in Every State in Which the Railroad is Doing Business.

Not only did the court below hold that this Court's decisions in *Daimler* and *Goodyear* do not apply to FELA cases, it asserted that this Court has held that state courts have personal jurisdiction over railroads in FELA cases whenever the railroad is doing business in the state, citing to *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379 (1953), *Miles*, and *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941). The Montana court concluded that "the U.S. Supreme Court consistently has interpreted 45 U.S.C. §56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a. And the court further asserted that *Daimler* did not overrule those prior decisions. Pet. App. 12a.

It is not surprising that *Daimler* did not discuss those cases because none of them addressed personal

jurisdiction, let alone the constitutional requirements that must be met in order for a state court to exercise general personal jurisdiction. *See* Pet. at 19-20. As Justice McKinnon pointed out in her dissent below, the majority arrived at its conclusion "*without citing a single* general jurisdiction case," but instead cited prior decisions of this Court "having nothing to do with general jurisdiction under the Due Process Clause." Pet. App. 27a-28a (emphasis in the original). There would have been no need for this Court to overrule those decisions because they do not stand for the proposition that the normal test for general personal jurisdiction does not apply in FELA cases.

Faced with this Court's holdings that a state court may exercise general personal jurisdiction only over a corporation that is "at home" in the state, the court below concluded that "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business.'" Pet. App. 12a. However, Congress may not countermand the requirements of the Constitution. Congress has no authority to affect the personal jurisdiction of state courts, and certainly has no power to grant state courts general personal jurisdiction over FELA defendants in circumstances that do not comport with the requirements of the Due Process Clause.

In any case, by concluding that Congress intended to confer general personal jurisdiction on state courts when it enacted 45 U.S.C. §56 of FELA, the court below misreads both the statute and congressional intent. Section 56 was enacted to address two specific problems, neither of which concerned the personal jurisdiction of state courts.

In its original form, FELA did not directly address jurisdiction; the statute simply provided that an action

must be brought within two years of the day it accrued.[4] For cases filed in federal court, in the absence of a specific venue provision the proper venue for FELA actions was governed by the general federal venue statute, which at the time limited venue to the district where the defendant was an inhabitant. Act of March 3, 1887, as amended by Act of August 13, 1888, c.866, 25 Stat. 433; *Cound v. Atchison, T. & S.F. Ry. Co.*, 173 F. 527, 533 (W.D. Tex. 1909) (under the federal venue statute, a FELA suit must be brought in the district where the railroad is an inhabitant, i.e., the state of incorporation); *Smith v. Detroit & T. Shore Line R.R.*, 175 F. 506 (N.D. Ohio 1909) (same). Some members of Congress felt that this limitation for federal cases was too restrictive.

Moreover, even though nothing in FELA abrogated the default rule of concurrent subject matter jurisdiction in state courts over federal causes of action, *see Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876), shortly after FELA was enacted the Supreme Court of Connecticut held that "Congress did not intend . . . to authorize the institution of an action under [FELA] in the courts of the States." *Hoxie v. N.Y., N. Haven & Hartford R.R.*, 73 A. 754, 762 (Conn. 1909).

Dissatisfaction with the scope of venue for FELA cases in federal court, and a desire to correct the error in *Hoxie*, led Congress to amend FELA in 1910 to add the current language of 45 U.S.C. §56, which reads:

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[4] FELA was first enacted in 1906, but was struck down as being beyond Congress' constitutional authority. *Howard v. Ill. Cent. R.R.*, 207 U.S. 462 (1908). FELA was reenacted in 1908, and was upheld by this Court as constitutional in all regards. *Mondou v. N.Y., N. Haven & Hartford R.R.*, 223 U.S. 1 (1912).

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

Act of April 5, 1910, c. 143, §1, 36 Stat.291.[5] The 1910 amendment also prohibited removal to federal court of FELA suits originally brought in state court. 28 U.S.C. §1445(a).

The first sentence of this amendment explicitly addressed venue in *federal* courts, and was intended to expand federal venue beyond the narrow prescriptions of the general venue statute in order to enhance the convenience of both parties. ("This amendment is necessary in order to avoid great inconvenience to the suitors . . ." H.R. REP. NO. 513, at 6 (1910).) "Section 6 establishes venue for an action in the federal courts." *Kepner*, 314 U.S. at 52. In *Pope*, this Court described Section 56 as the "venue provisions of the Federal Employers' Liability Act," 345 U.S. at 383. The Court also characterized a bill to amend Section 56, as addressing the question "of whether venue should be more narrowly restricted." *Id.* at 386.

The second sentence of the 1910 amendment addressed the states' *subject matter* jurisdiction in FELA cases. The amendment overruled *Hoxie* and simply clarified that states were competent to hear FELA

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[5] A 1939 amendment increased FELA's statute of limitations from two to three years. Act of Aug. 11, 1939, c. 685, §2, 53 Stat. 1404.

actions. H. REP. NO. 513, at 7 (1910) ("[M]uch injustice and wrong to suitors may be prevented by an express declaration that there is no intent on the part of Congress to confine remedial actions brought under [FELA] to the courts of the United States."); *see also* 45 CONG. REC. 2253 (1910) ("I am very sure that [state courts] have concurrent jurisdiction as the law is now, but on account of a decision of one of the state courts of Connecticut . . . the committee thought best to expressly provide in the law that the federal courts and the state courts should have concurrent jurisdiction to avoid the possibility of such a construction in the future.") (remarks of Representative Sterling). When the bill was taken up by the Senate, Senator Borah, noting the *Hoxie* decision, explained that the provision expressly granting concurrent jurisdiction to state courts, simply reflected what "the law is . . . unless there is a clause prohibiting or inhibiting the state court it always has concurrent jurisdiction with the federal courts in such a *subject-matter* as this." 45 CONG. REC. 3995 (1910). (emphasis supplied)

Contrary to the Montana court's decision below, Section 56 was not intended to confer personal jurisdiction on state courts. Rather, the purpose of Section 56 was to expand federal venue so FELA actions could be brought in additional federal courts beyond what was permitted by the existing general venue statute, and to confirm that state courts shared subject matter jurisdiction with federal courts. In *Mondou*, this Court observed that "[t]he amendment . . . instead of granting jurisdiction to the state courts, presupposes that they already possessed it." 223 U.S. at 56. This Court further explained that the 1910 amendment to Section 56 did not "involve any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." *Id.* In *Miles*, this

Court explained that "[s]ince the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts springs from federal law, the right to sue in state courts of proper venue *where their jurisdiction is adequate* is of the same quality as the right to sue in federal courts." 315 U.S. at 704 (emphasis supplied). There simply is no basis for concluding that Congress intended to confer personal jurisdiction on state courts when it amended FELA in 1910.

Perhaps sensing that it misconstrued the purpose of Section 56, the court below opined that it is unclear whether Congress meant to confer subject matter or personal jurisdiction on state courts. Pet. at 14a. The court resolved that question by finding that FELA's "liberal construction" justifies reading Section 56 to confer on state courts personal jurisdiction over any FELA defendant doing business in the forum state, a far more expansive concept of personal jurisdiction than the Due Process Clause allows. Pet. at 14a; *see also* Pet. at 18a ("We also have followed federal case law in giving the FELA a liberal construction to accomplish its humanitarian and remedial purposes (citations omitted). This is especially true regarding a plaintiff's forum selection under the FELA.") But a liberal construction of a statute is not a justification for abrogating a defendant's constitutional rights.

FELA's oft-remarked-upon liberal construction refers to its express modification of early twentieth century common law, which Congress believed was necessary in order to facilitate recovery at a time when common law rules often made recovery difficult for injured workers. This included eliminating the assumption of risk and fellow servant doctrines, 45 U.S.C. §54; *Chesapeake & Ohio Ry. Co. v. De Atley*, 241

U.S. 310, 313 (1916), and replacing the rule that barred recovery entirely if the worker's negligence contributed to the injury with a comparative negligence scheme. 45 U.S.C. §53. It also included incorporating a more relaxed standard of causation than traditional proximate cause. *CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2012). Finally, FELA outlawed contracts and devices the purpose of which is to limit the railroad's liability. 45 U.S.C. §55. Regardless of whether FELA should be construed "liberally," it is not possible to construe Section 56 as a grant of personal jurisdiction to state courts where the Due Process Clause forbids.

* * * *

This Court has instructed that there are constitutional limits on a state's ability to hale nonresident corporations into the state's courts to hear a cause of action that did not arise in the forum state, even if the corporation has continuous and systematic contacts with the state. Contrary to those rulings, the court below held that Montana may exert general personal jurisdiction over any nonresident railroad that does business in the state if the railroad is a defendant in a FELA action. As a result, by virtue of operating in many states—an inherent aspect of the business of large railroads—railroads will be subject to suit in states that have no connection to the underlying litigation, and where they are not "at home." This sets railroads apart as a unique class of corporate defendants that are outside the protection of the Due Process Clause. Only this Court can correct that error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 16-405

In the

Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Montana

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MONTANA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2(b), the Chamber of Commerce of the United States of America, Montana Chamber of Commerce, National Federation of Independent Business, and American Tort Reform Association respectfully move for permission to file the attached brief for *amici curiae*. Counsel for petitioner has consented to the filing of this brief. Counsel for one of the respondents has refused

consent; counsel for the other respondent has not responded to movants' repeated requests for consent.

Movants represent a diverse array of companies that conduct business across the United States and around the world. Movants' members thus have a keen interest in the predictability that comes when courts follow fair rules for personal jurisdiction and abide by the decisions of this Court. The Montana Supreme Court's decision fails on both counts. By holding that the due process guarantees reaffirmed in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), do not apply to U.S.-based defendants, the Montana Supreme Court has essentially ignored this Court's general personal jurisdiction holdings and created significant uncertainty for businesses as to where they may be haled into court for actions taken anywhere in the world.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. Ninety-six percent of the U.S. Chamber's members are small businesses with fewer than one hundred employees. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community. The U.S.

Chamber has participated as *amicus curiae* in every significant personal jurisdiction case recently decided by this Court, including *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler*, *supra*, and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and has filed briefs in a host of lower federal and state court cases applying those decisions. The U.S. Chamber's recent *amicus curiae* briefs in personal jurisdiction cases are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction.

The Montana Chamber of Commerce ("Montana Chamber") is Montana's largest business federation, representing more than 1,500 business members ranging from small, mom-and-pop operations to large corporations. Member businesses participate in virtually every sector of the economy, including retail, manufacturing, tourism, and agriculture. The Montana Chamber works to improve Montana's business climate. As part of its mission, the Montana Chamber files briefs as *amicus curiae* in order to provide courts with the perspective of the broader business community on issues relevant to Montana's ability to attract private sector investment. Indeed, given the importance of this case, the Montana Chamber previously filed an *amicus curiae* brief in support of petitioner with the Montana Supreme Court.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing approximately 325,000 member businesses in Washington, DC and

all fifty state capitals. Founded in 1943 as a nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will affect small businesses.

Founded in 1986, American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

Respectfully submitted,

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BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MONTANA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

AMICI ON THIS BRIEF

Chamber of Commerce of the United States of America

Montana Chamber of Commerce

National Federation of Independent Business

American Tort Reform Association

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STATEMENT OF INTEREST[1]

The interest of *amici curiae* the Chamber of Commerce of the United States of America, the Montana Chamber of Commerce, the National Federation of Independent Business, and American Tort Reform Association is set forth in the Motion for Leave to File a Brief, which is filed along with this brief.

SUMMARY OF THE ARGUMENT

This Court made unmistakably clear in *Daimler AG v. Bauman* that a state court may subject a defendant to general personal jurisdiction only where the defendant's "affiliations with the State in which suit is brought" are "so constant and pervasive 'as to render [it] essentially at home in the forum State.'" 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Court explained that, absent "exceptional" circumstances, a "foreign corporation" is "at home," and thus subject to "all-purpose" jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924. And the Court left no doubt that its references to "foreign corporations" and the Due Process Clause extend equally to corporations based

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intent to file this brief.

in a "sister-state" as well as "foreign-country" corporations. *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

Thus, when respondents—neither of whom are residents of Montana—sued Texas-based petitioner BNSF Railway Company in Montana for claims having no relation to Montana, the cases should have been swiftly dismissed, with the dismissals just as swiftly affirmed on appeal. To be sure, before this Court's recent decisions, BNSF's normal course of business in Montana might have been enough to subject the company to personal jurisdiction there on any claim arising anywhere in the world. But *Daimler* explicitly rejected the notion that a company's "substantial, continuous, and systematic course of business" in a forum could be enough to subject a company to personal jurisdiction on any claim arising anywhere. *Id.* at 761. Indeed, *Daimler*'s characterization of that very test as "unacceptably grasping," *id.*, should have led the Montana Supreme Court to conclude that BNSF is not subject to general personal jurisdiction in Montana.

But old habits die hard, and the Montana Supreme Court "decline[d]" to apply the straightforward language of *Daimler* here. Pet.App.15a. Instead, the court asserted that the decision had no purchase in BNSF's case because *Daimler* addressed only the narrow question of "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign* defendant based on events occurring entirely *outside the United States*." Pet.App.11a (emphases added).

And because BNSF is a U.S.-based defendant, the Montana high court reasoned, *Daimler* was "factually and legally distinguishable." Pet.App.15a.

As dissenting Justice McKinnon cogently explained, that reasoning is spectacularly flawed. Pet.App.20a-33a. Neither *Daimler* nor the guarantees of the Due Process Clause are limited to international defendants. Indeed, the Court made explicit that its holding applies to both "sister-state" and "foreign-country ... corporations." *Daimler*, 134 S. Ct. at 754. The Montana Supreme Court's contrary conclusion cannot stand.

The Montana Supreme Court's other rationale for subjecting BNSF to general personal jurisdiction in Montana is equally confounding. The plaintiffs alleged violations of the Federal Employers' Liability Act (FELA), which creates a right of action for railroad employees against their employers for injuries that occur on the job. FELA contains a generous venue provision that gives plaintiffs a broad selection of federal-court venues, and makes clear that state and federal courts have "concurrent jurisdiction" to hear the federal claims. 45 U.S.C. §56. The Montana Supreme Court held that this *venue* provision "make[s] a railroad 'at home' for *jurisdictional* purposes wherever it is 'doing business.'" Pet.App.12a (emphases added). But venue and jurisdiction are fundamentally different matters. "[P]ersonal jurisdiction ... goes to the court's power to exercise control over the parties" and is thus "typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S.

173, 180 (1979). Moreover, personal jurisdiction, unlike venue, is a fundamental constitutional prerequisite for the exercise of adjudicators' power. In short, personal jurisdiction precedes venue; venue cannot exist where there is no personal jurisdiction; and FELA's venue provision did not and could not expand a state court's power to subject out-of-state defendants to its jurisdiction.

The Montana Supreme Court's conception of general personal jurisdiction is not only irreconcilable with this Court's precedent. It also raises exactly the kinds of unfairness problems that this Court sought to rectify in its previous personal jurisdiction holdings. The Court has repeatedly recognized the practical need for simple and fair jurisdictional rules, and *Daimler*'s test for determining where a defendant is subject to all-purpose jurisdiction fits that bill. These predictable rules help potential defendants structure their conduct, guide potential plaintiffs to an appropriate forum for litigation, and assist all parties in efficiently litigating the actual merits of their claims, rather than engaging in costly threshold disputes over where the claims can be heard. Montana's novel approach, on the other hand, demands fact-intensive jurisdictional inquiries and subjects nearly every company that does some business in Montana to the risk that it could be haled into a Montana court for any action it takes anywhere in the world. The resulting uncertainty fosters massive inefficiencies and is critically unfair for defendants, especially for small businesses, which frequently lack the resources to adequately defend themselves in expensive litigation in distant and unfamiliar forums.

Finally, this case represents only the latest attempt by the Montana Supreme Court to defy the decisions of this Court. The Montana court has repeatedly relied on tenuous readings of this Court's precedents to try to exempt the state from rulings of this Court with which it disagrees. And this Court has repeatedly and justifiably intervened to make clear that the Constitution applies with full force in Montana as it does in every other State. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012). The Montana Supreme Court's attempts to distinguish *Daimler* here are similarly unavailing and warrant the same result. Indeed, the decision below is of a piece with other recent decisions by state supreme courts circumventing this Court's jurisdictional rulings on the flimsiest of grounds. These decisions signal a troubling trend that threatens to undo this Court's jurisprudence and sow the very confusion and unfairness this Court has endeavored to eliminate. The Court should arrest this nascent movement by granting BNSF's petition and holding that constitutional due process is not subject to geographic or statutory carve-outs.

ARGUMENT

I. The Montana Supreme Court's Decision Ignores This Court's Clear Holdings Regarding General Personal Jurisdiction.

The Due Process Clause of the Fourteenth Amendment prohibits a state from authorizing its courts to exercise personal jurisdiction over an out-of-state defendant unless the defendant has "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional

notions of fair play and substantial justice." *Daimler*, 134 S. Ct. at 754 (brackets omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also* Fed. R. Civ. P. 4(k)(1)(A) (permitting district court jurisdiction over defendant subject to jurisdiction in court of forum state).

"[T]wo categories of personal jurisdiction" guide the application of the minimum contacts test. *Daimler*, 134 S. Ct. at 754. Specific personal jurisdiction applies when the suit "arises out of or relates to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 923-24. For a state to exercise specific personal jurisdiction consistent with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

General personal jurisdiction, on the other hand, allows a court to hear "any and all claims against [the defendant]." *Daimler*, 134 S. Ct. at 751. For this "all-purpose" jurisdiction to be appropriate, however, the defendant's "affiliations with the State in which suit is brought" must be "so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Id.* (quoting *Goodyear*, 564 U.S. at 919). Absent "exceptional" circumstances, a corporation is "at home," and thus subject to general jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924.

Daimler put to rest the misconception that state courts could exercise general personal jurisdiction based merely on "activities in the forum [that] are

'substantial' or 'continuous and systematic.'" *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011). Rejecting that approach as "unacceptably grasping," the Court clarified that the relevant inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761 (brackets omitted) (quoting *Goodyear*, 564 U.S. at 919). Subjecting defendants to general jurisdiction in any other state "would not accord with the 'fair play and substantial justice' due process demands." *Id.* at 763 (quoting *Int'l Shoe*, 326 U.S. at 316).

The Montana Supreme Court's decision blatantly disregards this clear teaching and warrants summary reversal. Petitioner BNSF is a Delaware corporation with its principal place of business in Texas. Plaintiffs sued BNSF not in Delaware or Texas, but in Montana on tort claims that are unrelated to any of BNSF's activity in Montana. Pet.App.3a-4a. BNSF argued that the cases should be dismissed for lack of personal jurisdiction, but the Montana Supreme Court disagreed. Parroting the plaintiffs in *Daimler*, the court held that BNSF could be subject to general personal jurisdiction because "BNSF maintains substantial, continuous, and systematic contacts with Montana." Pet.App.17a. To explain away this Court's recent, on-point decision in *Daimler*, the court asserted that *Daimler* addressed only "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign* defendant based on events

occurring *entirely outside the United States*." Pet.App.11a (quoting *Daimler*, 134 S. Ct. at 750) (emphasis added). The Montana Supreme Court concluded that because plaintiffs' claims did not involve a foreign defendant or "torts that occur[red] in foreign countries," *Daimler* was "factually and legally distinguishable," and Montana state courts could exercise general personal jurisdiction over BNSF. Pet.App.11a, 15a.

That reasoning is spectacularly flawed. The Montana Supreme Court's tenuous justification for "declin[ing]" to follow *Daimler* is profoundly misguided at best, and willfully defiant at worst. Pet.App.15a. Nothing in *Daimler* remotely suggests that its holding regarding defendants' due process rights is limited to only international defendants. To the contrary, the Court made clear that the Due Process Clause protects all "out-of-state defendants" from "exorbitant exercises of all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 761-62. The Court even made explicit that, when it referred to "foreign" defendants, it meant foreign in the sense relevant for the personal jurisdiction inquiry, namely, any out-of-state defendant, whether based in a "sister-state" or a "foreign-country." *Id.* at 754. There is no basis in the Constitution, this Court's decisions, or common sense for limiting due process protections to only the latter group.

The Montana Supreme Court's alternative rationale for ignoring *Daimler* is equally baseless. Plaintiffs brought their actions under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, which makes railroads liable to their "employees in

damages for injuries resulting in whole or in part from the fault of 'any of the officers, agents, or employees' of such carrier." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 328 (1958) (quoting 45 U.S.C. §51). FELA was initially subject to the general venue statute, which fixed venue for suits brought in federal court in the district in which the defendant resided. Pet.App.6a (citing *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941)). Congress later added a venue provision to FELA that provides that plaintiffs may file "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. §56. The section also makes clear that state courts can entertain FELA actions by providing that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." *Id.*

It is hornbook law that "[t]he question of personal jurisdiction ... goes to the court's power to exercise control over the parties," while the question of "venue ... is primarily a matter of choosing a convenient forum." *Leroy*, 443 U.S. at 180. "This basic difference between the court's power and the litigant's convenience is historic in the federal courts." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Nevertheless, the Montana Supreme Court seized on FELA's venue provision to conclude that "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business.'" Pet.App.12a. This reasoning represents a clear and erroneous conflation

of venue and jurisdiction. Venue provisions like 45 U.S.C. §56 do not (and cannot) expand personal jurisdiction; rather, they "come into play only after jurisdiction has been established." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985). Thus, "Congress did not, nor could it, ... confer personal jurisdiction with the passage of 45 U.S.C. §56." Pet.App.29a (McKinnon, J., dissenting).

Attempting to avoid this obvious conclusion, the Montana Supreme Court relied on equivocation, noting that "45 U.S.C. §56 does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction ...." Pet.App.14a. But as Justice McKinnon recognized in her dissent, "'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet.App.30-31a (citing statutory and judicial authorities). Thus, this Court has repeatedly contrasted "concurrent jurisdiction" with "exclusive federal court jurisdiction over cases arising under federal law," a comparison that turns on the *nature* of the claim, not the *territory* in which the claim is brought. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962); *see also Tafflin v. Levitt*, 493 U.S. 455, 467-68 (1990) (discussing whether "Congress intended exclusive federal jurisdiction" or "concurrent state court jurisdiction" over federal RICO claims); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("[I]f exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take

it."). The Montana Supreme Court's indefensible misreading (or mischaracterization) of "concurrent jurisdiction" fails to advance its equally untenable position that FELA defendants are not entitled to full due process rights.

Similarly, the Montana Supreme Court claimed to identify "decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet.App.12a. But as Justice McKinnon correctly noted, the majority "arrive[d] at this conclusion *without citing a single* general jurisdiction case." Pet.App.27a. Instead, the majority relied on two decisions that involved only the issue of whether state courts could enjoin an otherwise legitimate FELA action filed in another state court on grounds that the plaintiff's choice of venue was oppressive or inconvenient, *see Pope v. Atl. Coast Line R. Co.*, 345 U.S. 379, 383 (1953); *Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 699 (1942), and one decision that concerned whether allowing a FELA action to proceed would impose "an undue burden on interstate commerce." *Denver & R. G. W. R. Co. v. Terte*, 284 U.S. 284, 285 (1932). "These cases do not so much as mention the Due Process Clause or general jurisdiction," Pet.App.28a (McKinnon, J., dissenting), which is unsurprising, as FELA cannot negate the "individual liberty interest preserved by the Due Process Clause." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

The Montana Supreme Court's decision is even more inexplicable considering how many other

federal courts of appeals and state courts of last resort have recognized that "*Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a corporation." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014); *see, e.g.*, *Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015) (noting *Daimler*'s "stringent criteria"); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (noting that, in light of *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business"). Thus, "except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016).

The Montana Supreme Court, however, never suggested that BNSF's case was in any way "exceptional," *Daimler*, 134 S. Ct. at 761 n.19, nor would there have been any grounds for such a holding. This Court has identified only one such "exceptional case"—*Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952). *Perkins* involved a Philippines-based corporation that temporarily conducted its business from Ohio during the Japanese occupation of the Philippines in World War II. *Daimler*, 134 S. Ct. at 756 & n.8. The *Perkins* Court held that the company's contacts with Ohio were so continuous and systematic that "Ohio could be considered 'a surrogate for the place of incorporation or head office.'" *Id.* But this set of circumstances is so "exceptional" that, post-*Daimler*, *amici* are aware of no federal circuit court that has

identified a similarly exceptional case warranting the exercise of general personal jurisdiction. And given that BNSF operates rail lines in 28 states, Pet.6, "general jurisdiction would be quite the *opposite* of 'exceptional' if such contacts were held sufficient to render the corporation 'at home' in the state." *Brown*, 814 F.3d at 630. Yet the Montana Supreme Court held that BSNF is "at home" in Montana only because it is "doing business" there, Pet.App.12a, a clear confirmation that the court's decision cannot be squared with any reasonable reading of *Daimler*.

II. The Montana Supreme Court's Decision Reintroduces The Unfairness And Uncertainty This Court Has Sought To Eliminate.

"The Due Process Clause, by ensuring the 'orderly administration of the laws,' ... gives a degree of predictability to the legal system" for potential defendants. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Int'l Shoe*, 326 U.S. at 319). And, as the Court has noted, "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). *Daimler* promoted this predictability for defendants, recognizing that it "is one thing to hold a corporation answerable for operations in the forum State, ... quite another to expose it to suit on claims having no connection whatever to the forum State." *Daimler*, 134 S. Ct. at 761 n.19. After all, if corporations could be subjected to all-purpose jurisdiction for merely doing "substantial, continuous, and systematic" business in a state, it would be well-nigh impossible for them "to

structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The Montana Supreme Court cast aside these concerns when it resurrected the "substantial, continuous, and systematic contacts" standard for U.S.-based defendants. Pet.App.17a. By imposing "exorbitant exercises of all-purpose jurisdiction," the decision below has created uncertainty for all U.S. businesses operating in Montana, as they face the prospect of being haled into Montana courts to answer for conduct that occurs anywhere in the world. And each day the decision stands, that uncertainty grows for all companies operating in the United States, as the Montana decision serves as a template for enterprising plaintiffs and courts that would seek to limit *Daimler* to only certain causes of action or certain classes of "foreign" defendants. *See, e.g.*, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 333 (W. Va. 2016) (noting that that "the Court in *Daimler* paid significant attention to the 'transnational context' of the dispute" and remanding for jurisdictional discovery).

The predicament that a company like BNSF now faces illustrates one of the practical reasons for concluding that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. BNSF operates in 28 states and 2 Canadian provinces. Pet.6. Only about 2,000 of the 32,500 miles of railroad track that BNSF operates are located in

Montana, and less than 10% of the company's revenue is generated there. Pet.App.63a. But because the Montana Supreme Court carved a gaping hole in *Daimler*, BNSF can expect to be haled into Montana for at least all FELA claims and likely other claims that arise from actions BNSF takes anywhere in the United States if not the world. Moreover, the prospect of such unpredictable and potentially costly litigation is particularly daunting for small businesses, which often lack the resources to adequately defend themselves in distant and unfamiliar forums. Thus, unless this Court reverses the Montana Supreme Court's decision, it will be impossible for BNSF and other "[potential] defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762.

The Montana Supreme Court's decision also needlessly reintroduces complex factual inquiries into what should be clean-cut jurisdictional analyses. When the Court explained in *Daimler* that a corporation is typically at home only where it is incorporated or has its principal place of business, it noted that these "affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." 134 S. Ct. at 760. Such "[s]imple jurisdictional rules ... promote greater predictability," *id.*, which is beneficial both to potential defendants structuring their affairs and to "plaintiffs deciding [where] to file suit," *Hertz*, 559 U.S. at 95. The Montana Supreme Court's decision, however, moves past these "paradig[m] ... bases for general jurisdiction," *Daimler*, 134 S. Ct. at 760, and

requires investigation into whether "[a] nonresident *defendant ... maintains 'substantial' or 'continuous* and systematic' contacts with Montana." Pet.App.16a. This "factually intensive" inquiry, *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999), is sure to "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 559 U.S. at 94.

Finally, the Montana Supreme Court's decision imposes unnecessary burdens on state courts, opening them up to claims that have nothing to do with their state. Indeed, one of the trial court judges below complained that he alone had "about 12 FELA cases pending where the Plaintiff is not a Montana resident and where there are no Montana related acts or omissions." Pet.App.36a-37a. While "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," *Burger King*, 471 U.S. at 473—albeit an interest that cannot negate an out-of-state defendant's due process rights—Montana has no similar interest in ensuring that nonresident plaintiffs are made whole by nonresident defendants. *Cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987) ("Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.*"). Thus, fair play, substantial justice, and good sense dictate that such claims be brought where the cause of action arises or where the defendant is at home.

III. The Montana Supreme Court Has Repeatedly Defied The Decisions Of This Court, And It And Other State Courts Are Evading This Court's Jurisdictional Holdings.

"[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Thus, when this Court issues "an authoritative interpretation" of federal law, "the judges of every State must follow it." *Id.*; *see also* U.S. Const. art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

Daimler made clear that, except "in an exceptional case," an out-of-state corporate defendant can be properly subjected to general personal jurisdiction only where it has "its formal place of incorporation or principal place of business." 134 S. Ct. at 761 n.19. The Montana Supreme Court's reasons for nevertheless exercising general personal jurisdiction over an out-of-state defendant "fail to meaningfully distinguish that case," *Bullock*, 132 S. Ct. at 2491, and warrant summary reversal.

This is not the first time the Montana Supreme Court has relied on demonstrably dubious reasoning to defy the decisions of this Court. Just a few years ago, the Montana Supreme Court's willingness to discard controlling Supreme Court precedent was on display when the Montana court attempted to exempt Montana from the reach of *Citizens United v. FEC*, 558 U.S. 310 (2010). *See W. Tradition P'ship,*

Inc. v. Attorney Gen. of State, 271 P.3d 1 (Mont. 2011). Plaintiffs brought a First Amendment challenge to a Montana state law that prohibited "political expenditures by corporations on behalf of or opposing candidates for public office." *Id.* at 3. The Montana Supreme Court recognized that "[a] premise of *Citizens United* was that First Amendment protections extend to corporations." *Id.* at 5. But the court maintained that "*Citizens United* was a case decided upon its facts, and involved 'unique and complex' rules" that applied to federal elections. *Id.* The court then identified several aspects of Montana's history, economy, and geography that allegedly established that "Montana has unique and compelling interests" sufficient to sustain the statute under *Citizens United*. *Id.* at 11.

Two justices dissented. Justice Baker accused the majority of "inventing distinctions in what I fear will be a vain attempt to rescue Montana's" law. *Id.* at 14. Justice Nelson was even more critical, assailing the majority's "decision to parse *Citizens United* in a fashion so as to 'send a message' to, or be the next 'test case' before, the Supreme Court." *Id.* at 36. He blasted the majority's attempt to "render Montana exempt from *Citizens United*," as "disingenuous." *Id.* at 17, 36. He concluded by forecasting that, "[w]hen this case is appealed to the Supreme Court, ... a summary reversal on the merits would not surprise me in the least." *Id.* at 36 (citation omitted).

Fewer than six months later, this Court summarily reversed. *Bullock*, 132 S. Ct. at 2491. The Court held that "[t]here can be no serious doubt"

that "the holding of *Citizens United* applies to the Montana state law." *Id.* The Court noted that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Id.*

The Montana Supreme Court has also tried to exempt Montana from this Court's Federal Arbitration Act jurisprudence. In *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), the court refused to enforce a contractual arbitration provision because the provision did not comply with a state law that required arbitration provisions to appear on the front page of a contract. This Court granted, vacated, and remanded that decision for further consideration in light of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995), which reaffirmed that, under the FAA, states could invalidate arbitration clauses only on grounds that apply equally to any contract. *Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995). On remand, even though the Montana law clearly "singl[ed] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Montana Supreme Court simply reinstated its opinion "without inviting or permitting further briefing or oral argument," *id.* at 686. This Court swiftly granted certiorari and reversed, holding that the Montana law was preempted by the FAA. *Id.* at 688-89.

While the Montana court's questionable reasoning in *Casarotto* could be interpreted as a subtle attempt to test the boundaries of this Court's reasoning, the reactions of two Montana justices to

the Court's second decision in the case made clear that outright insubordination drove their decisionmaking. After this Court sent the case back to the Montana Supreme Court a second time, two of the court's justices refused to sign a routine order remanding for further proceedings; they proclaimed that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Rueben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16.

The Montana Supreme Court's decision in this case fits this pattern of defiance. The court meticulously, yet unconvincingly, parsed *Daimler* in a naked attempt to limit it to purely international disputes. The court likewise ignored basic hornbook law when it concluded that FELA's venue provision could expand personal jurisdiction at the expense of defendants' constitutional rights. But "foreign" in the personal jurisdiction context is used in contradistinction to the domestic or home-state forum and is synonymous with "out-of-state." Indeed, *Daimler* explicitly applies to both "sister-state" and "foreign-country ... corporations." 134 S. Ct. at 754. And just as "[t]here is no 'Montana exception'" to *Citizens United*, *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting), there are no FELA, U.S.-based-defendant, or Montana exceptions to *Daimler*.

The Montana Supreme Court is not alone in resisting the clear import of *Daimler*. While the Montana Supreme Court attempted to circumvent *Daimler* by recasting principles of general personal jurisdiction, several other courts similarly seeking "to mitigate the consequences of *Daimler*'s restrictions on general jurisdiction" have resorted to "a more liberal view of 'related contacts' for specific jurisdiction." Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 685 (2015). In so doing, the highest judicial tribunals in several other states have begun to dismantle this Court's careful limits governing state courts' exercise of personal jurisdiction and, consequently, to sow widespread confusion over the constitutional boundaries.

For example, the Supreme Court of California has sought to eviscerate the limits set by this Court on general jurisdiction through a sweeping expansion of specific jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016), the court addressed claims against nonresident defendants wholly unrelated to the defendants' contacts with California. This Court's decisions in *Daimler* and *Goodyear* foreclosed any reliance on general jurisdiction because the nonresident defendants were not "at home" in California, and indeed the California Supreme Court held that general jurisdiction would not lie. *Id.* at 883-84. Remarkably, though, the Court did not dismiss the claims. Instead, after paying lip service to this Court's recent general jurisdiction jurisprudence, a badly divided court

effected a blatant end-run around those decisions by adopting a capacious specific jurisdiction theory manufactured from whole cloth. Specifically, it announced a "sliding scale approach to specific [personal] jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim," such that specific personal jurisdiction may be appropriate even in the absence of a direct factual relationship between the plaintiffs' claims. *Id.* at 889.

Just as the California Supreme Court has obliterated the distinction between general and specific jurisdiction, the Supreme Court of Texas recently chipped away another bedrock principle of personal jurisdiction: the requirement that due process must be met as to each defendant, *see, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). In *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, 493 S.W.3d 65 (Tex. 2016), nonresident domestic partnerships established subsidiaries in Delaware in order to facilitate the purchase of assets in Texas. The question before the Texas Supreme Court was whether those partnerships could be sued under a specific personal jurisdiction theory based upon the formation of subsidiaries in another state. Though this Court suggested in *Goodyear* and *Bauman* that one party's contacts might be imputed to another party under very limited circumstances, the plaintiffs in *Cornerstone* had waived any reliance on any such theory. That should have ended the case. Yet the Texas Supreme Court nonetheless upheld the exercise of specific jurisdiction because the

partnerships, through the creation of the Delaware subsidiaries, had "targeted Texas assets in which to invest and sought to profit from that investment." *Id.* at 73-74.

Cornerstone is not the only example of the renegade personal jurisdiction jurisprudence emanating from the Texas Supreme Court. In *T.V. Azteca S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), that court weakened other constitutional boundaries set by this Court on the use of the "effects" test to establish specific jurisdiction. *Azteca* involved whether the Texas courts could rely on the "effects" test to support specific jurisdiction over nonresident defendants. Although this Court had just recently narrowed the sweep of the "effects" test in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Texas Supreme Court overrode *Walden*'s limits. It invoked a version of the effects test that allowed the nonresident defendants' alleged efforts to "serve the market" in the forum to suffice. 490 S.W. at 46.

Much like the Texas court's dilution of the effects test and the relatedness requirement, Washington's highest court recently adopted an extraordinarily lax standard governing the exercise of specific jurisdiction over nonresident companies based upon the so-called stream-of-commerce theory. In *State v. L.G. Electronics, Inc.*, 375 P.3d 1035 (Wash. 2016) (en banc), nonresident companies manufactured component parts that other companies incorporated into finished products. Although this Court had recently rejected the New Jersey Supreme Court's expansive interpretation of the stream-of-commerce theory in *J. McIntyre Machinery, Ltd. v. Nicastro*,

564 U.S. 873 (2011), a divided Washington Supreme Court upheld the exercise of specific jurisdiction. It based its conclusion primarily upon the quantity of finished products flowing into the United States, including Washington, and containing defendants' component parts—a theory never embraced by a majority of this Court. *L.G. Electronics*, 375 P.3d at 1042-43.

These recent cases demonstrate that the Court needs to bring "specific jurisdiction ... into sharper relief," *Daimler*, 134 S. Ct. at 755, in order to ensure that courts do not "merely regenerat[e] general jurisdiction under a different name." Silberman, 19 Lewis & Clark L. Rev. at 685. But while it is bad enough that many courts have distorted specific personal jurisdiction to stage an end-run around *Daimler*, the Montana Supreme Court's decision goes a step further by brazenly ignoring *Daimler*'s clear teaching on general jurisdiction. As Justice Nelson of the Montana Supreme Court recognized when he broke with his colleagues five years ago, a state court must resist the "call ... to thumb its nose at the federal government, to disregard federal law, and to boldly ignore the Supremacy Clause." *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting). And when, as here, a state court has ignored federal law, it is imperative that the Court intervene to make clear that its decisions must be followed.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the decision below or, in the alternative, grant the petition for certiorari.

Respectfully submitted,

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October 28, 2016

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RECORD AND BRIEFS

No. 16-405

IN THE SUPREME COURT OF THE UNITED STATES

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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October 28, 2016

MOTION FOR LEAVE TO FILE

The National Association of Manufacturers (NAM) hereby moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari to the Supreme Court of Montana. NAM is filing this motion because Respondents declined to consent to NAM's filing of its brief.[1] A copy of the proposed brief is attached.

As explained more fully in the attached brief under "Interest of *Amicus Curiae*," NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states.

In the modern economy, manufacturers of all sizes regularly purchase materials, as well as make and sell their products, in markets across the country. Given the increasingly interconnected economic environment for manufacturers and other businesses, this Court placed a firm constitutional check on where corporations can be subject to liability in the event that its products or operations wrongfully cause injury. The Court concluded that, as a matter of due process, a state can exercise general personal jurisdiction over a business only where it is "at home," largely its place of incorporation or principal place of business. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

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[1] NAM requested consent from Respondents, and Respondents declined to consent, on October 10, 2016. Petitioner granted consent to the filing of this brief.

NAM is concerned that courts are creating unwarranted exceptions to this constraint on general, all-purpose jurisdiction. The Supreme Court of Montana's decision, which limits this Court's due process safeguards to foreign disputes arising abroad, and exempts claims brought under Federal Employers Liability Act's (FELA), is an example. NAM members have a strong interest in faithful and consistent application of *Daimler* and *Goodyear* to domestic manufacturers and ensuring that constitutional protections that preclude improper forum shopping are not trumped by statute. If not reversed, the Supreme Court of Montana's decision, and others like it, will subject manufacturers to the jurisdiction of courts in states that have little or no relationship to the lawsuit and that unfairly subject them to liability exposure that is greater than other states.

NAM respectfully requests that the Court grant leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 6

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International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) 4, 8, 17

J. McIntyre Mach., Ltd. v. Nicastro,
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Leroy v. Great Western United Corp.,
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Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1 (1912) 17

Ruhrgas AG v. Marathon Oil Co.,
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Tyrrell v. BNSF Ry. Co., 373 P.3d 1 (Mont. 2016) ... 13

Weisblum v. Prophase Labs, Inc.,
88 F.Supp.3d 283 (S.D.N.Y. 2015) 11

World-Wide Volkswagen Corp. v. Woodson,
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Statutes

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Other Authorities

Am. Tort Reform Found., Judicial Hellholes (2015), *at* http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf 9

Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 9

Paul Bovarnick, *On the Tracks: Helping Injured Railroad Workers*, Trial Lawyer, at 33 (Fall 2012), *at* http://www.rsblaw.net/beta/wp-

content/uploads/2015/06/On-the-tracks_helping-injured-rr-workers.pdf 8

Anthony Caruso, Statistics of U.S. Businesses Employment and Payroll Summary: 2012 (2015) 5

Amaris Elliott-Engle, *Common Pleas Court Seeing More Diaetes Drug Cases*, Legal Intelligencer, Mar. 19, 2009, at 1 10

Amaris Elliott-Engle, *Philadelphia Courts May See Substantial Layoffs*, Legal Intelligencer, Jan. 29, 2009 10

Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, Bloomberg Businessweek, Sept. 29, 2016, *at* http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis 11

FY 2014 Profile 22nd Circuit, Missouri Courts, *at* http://www.courts.mo.gov/file.jsp?id= 83194 11

FY 2015 Profile 22nd Circuit, Missouri Courts, *at* http://www.courts.mo.gov/file.jsp?id=96374 11

Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents*, Madison-St. Clair Record, Mar. 23, 2016 9-10

William R. Hanlon & Richard M. Wyner, Commentary: *Daimler Turns Two: Personal Jurisdiction Over Out-Of-State Mass Tort Defendants in the Wake of Daimler AG v. Bauman*, Mealey's Litig. Rep.: Asbestos, vol. 31, no. 5, Apr. 13, 2016 15

Dana Herra, *Say Cheese: Class Actions Begin to Pile Up vs Kraft, Walmart over Parmesan Cheese Contents*, Cook County Record, Mar. 1, 2016, *at* http://cookcountyrecord.com/stories/510698243-say-cheese-class-actions-begin-to-pile-up-vs-kraft-walmart-over-parmesan-cheese-contents 11

KCIC, Asbestos Litigation: 2016 Mid-Year Update (2016), *at* http://riskybusiness.kcic.com/wp-content/uploads/2016/09/KCIC-Asbestos-Mid-Year-Report-2016-1.pdf 9, 14

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595 (1997) 12

Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady*, Legal Intelligencer, July 25, 2016, *at* http://www.thelegalintelligencer.com/latest-news/id=1202763506813/OutofState-Pharma-Filings-Dip-as-Phila-Mass-Torts-Remain-Steady 10

Mark D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11-7 Mealey's Asb. Bankr. Rep. 24 (2012) 10

Dmitry Slepov, *Micromanufacturing the Future*, Tech Crunch, Apr. 3, 2016, *at* https://techcrunch.com/2016/04/03/micromanufacturing-the-future/ 5

U.S. Chamber Inst. for Legal Reform, 2015 Lawsuit Climates Survey: Ranking the States (2015), *at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-Harris Report 6

INTEREST OF *AMICUS CURIAE* [1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation.

NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. NAM is concerned that courts are creating unwarranted exceptions to this Court's decisions constraining general, all-purpose jurisdiction. As a result, manufacturers may be subject to the jurisdiction of courts in states that have little or no relationship to the lawsuit and that unfairly subject them to liability exposure that is greater than other states.

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[1] Pursuant to Rule 37.6, counsel for NAM certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than the NAM, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Petitioner has consented to the filing of this brief, but Respondents have withheld their consent.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has ushered in a new era of general personal jurisdiction in the past five years that properly reflects the modern economy where even the smallest businesses engage in commerce throughout the United States. Given this new environment, the Court placed a firm constitutional check on where businesses can be subject to liability in the event that their products or operations wrongfully cause injury. The Court concluded that, as a matter of due process, a state can exercise general personal jurisdiction over a business only where it is "at home," largely its place of incorporation or principal place of business. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Some courts, including the Supreme Court of Montana in the case at bar, have not applied these constitutional limits.

This case provides the Court with an important opportunity to give full effect to its recent jurisprudence in *Daimler* and *Goodyear*. Here, Montana's Supreme Court created unsupported exceptions to *Daimler*, ruling that *Daimler*'s "at home" requirement applies only to foreign (outside the United States) defendants and that the Federal Employers Liability Act's (FELA) venue provision supersedes constitutional due-process limits on personal jurisdictional. As a result, Montana courts exercised personal jurisdiction over the defendant in a case where the defendant is not "at home" in Montana, the plaintiff does not reside in Montana, and the alleged injury and all events allegedly causing the injury oc-

curred outside Montana. This case presents the exact result this Court sought to prohibit in *Daimler*.

The Montana Supreme Court's ruling, if not reversed, will dissolve the significance of *Daimler* and *Goodyear*. U.S.-based companies, in particular, would be subject to improper forum shopping. Of relevance here, Montana has become a favored destination for certain FELA cases because its courts generously interpret FELA's statute of limitations, giving new life to claims that would be untimely in other jurisdictions. As discussed below, other courts have become jurisdictions of choice for other types of claims, such as asbestos litigation, prescription drug product suits, and consumer claims.

This Court should grant *certiorari* to resolve the inconsistency in the law embodied in the Montana Supreme Court's decision and make clear that the constitutional safeguards established in *Goodyear* and reaffirmed in *Daimler* apply to all claims. Manufacturers and other businesses should not be compelled to appear in jurisdictions when they have insufficient connection to the locale and when the incident, people, and evidence are hundreds or thousands of miles away.

ARGUMENT

I. GIVEN TODAY'S GLOBAL MANUFACTURING ECONOMY, THE COURT SHOULD GRANT *CERTIORARI* TO ENSURE THAT STATES ARE APPLYING *DAIMLER'S* "AT HOME" REQUIREMENTS FOR GENERAL PERSONAL JURISDICTION

Some courts are clearly struggling with, or refusing to follow, the constitutional due process stand-

ards for general jurisdiction that this Court set forth in *Daimler* and *Goodyear*. While this Court clearly set a high bar for general personal jurisdiction, courts have continued imposing a sprawling view of general jurisdiction by accepting such jurisdiction based solely on a company's presence in a state through offices, employees, agents for service of process, operations, or sales. That approach is untenable in an increasingly global marketplace for manufacturers. As the Petition demonstrates, the Montana ruling at bar is not isolated.

As a threshold matter, some courts may be confusing general and specific jurisdiction, and this Court should take this opportunity to reinforce that general jurisdiction comes into play only when there is an insufficient connection between the lawsuit at issue and the state in which it is filed to support personal jurisdiction. General jurisdiction is a fallback for when a plaintiff cannot establish specific jurisdiction where the action arose. *See Daimler*, 134 S. Ct. at 757 ("Although placement of a product into the stream of commerce may bolster an affiliation germane to *specific* jurisdiction, . . . such contacts do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.").[2] The Court can make clear that these rulings do not impact specific jurisdiction and that the two concepts are entirely distinct.

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[2] *See also International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (recognizing that when a lawsuit "arise[s] out of or [is] connected with the [corporation's] activities within the state," due process allows that state to exercise jurisdiction over the corporation).

In response to this specific case, the Court should grant *certiorari* to clarify that its tightened requirements for general jurisdiction apply to all companies, not just foreign entities, and its due process protections cannot be overridden by statute, as attempted here. *Goodyear* and *Daimler* properly embrace the manner in which manufacturers and other companies do business today and follow this Court's long tradition of tailoring constitutional general jurisdictional safeguards to the marketplace. *Cf. Burnham v. Super. Ct. of Cal., County of Marin*, 495 U.S. 604, 617 (1990) (recognizing that jurisdiction jurisprudence has historically reflected "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity.").

Today, the marketplace is increasingly global, allowing small and medium-size manufacturers to purchase materials, as well as make and sell their products in markets across the country. Three-quarters of manufacturing firms have less than twenty employees. *See* Anthony Caruso, Statistics of U.S. Businesses Employment and Payroll Summary: 2012, at 7 (2015). Only about six percent of manufacturers exceed one hundred employees. *See id.* Further, the trend is for manufacturers to make products in America in small quantities in small facilities. *See* Dmitry Slepov, *Micromanufacturing the Future*, Tech Crunch, Apr. 3, 2016, *at* https://techcrunch.com/2016/04/03/micromanufacturing-the-future/. Although a manufacturer's operations may be centered in one or two states, in today's internet era, most manufacturers—large or small—buy parts and make volumes of sales throughout the country.

Thus, a manufacturer may well have "substantial, continuous, and systematic" activities in a state, but not be "at home" in that state. *Daimler*, 134 S. Ct. at 761. The critical question, as this Court explained, "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,'" but rather whether those contacts are "so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* (quoting *Goodyear*, 564 U.S. at 919). The Court properly concluded that a business's state of incorporation and principal place of business are the two "paradigm all-purpose forums." *Id.* at 760. "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.*

Indeed, when manufacturers and other businesses consider where to incorporate and locate their principal place of business, the predictability of legal exposure and risks are becoming significantly growing factors. *See* U.S. Chamber Inst. for Legal Reform, 2015 Lawsuit Climates Survey: Ranking the States (2015), at 3-4, *at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf (finding 75 percent of respondents reported that a state's litigation environment is likely to impact important business decisions, such as where to locate or do business). As this Court has appreciated, businesses must be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)); *see also Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) (stating due

process requires a defendant to have "fair warning" as to where it may be subject to jurisdiction).

Businesses that make computer and electronic equipment in Oregon, for example, should not be subject to general jurisdiction in New York simply because consumers purchase many laptops there. Companies that make airplanes in places such as Seattle, Washington, and Mobile, Alabama, should not be compelled to appear in an Illinois court based on planes regularly flying into Chicago. Food producers in Iowa and North Carolina should not be subject to jurisdiction in Florida merely because people ultimately buy food in supermarkets there. A pharmaceutical maker based in Indiana should not face lawsuits in Pennsylvania solely based on the quantity of prescriptions filled in the state. As in *Daimler*, companies that make cars in places such as Michigan, Indiana, and Tennessee should not face lawsuits in any state in which its cars are merely sold or driven. *See Daimler*, 134 S. Ct. at 762 n.20 ("A corporation that operates in many places can scarcely be deemed at home in all of them.").

As this Court has found, the "at-home" requirement lends predictability to the civil justice system and allows businesses to control, within reason, the laws under which they will operate and be subject to liability. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This constitutional constraint is particularly critical to manufacturers who cannot afford the cost, business interruptions, and additional liability exposure of trying cases in faraway jurisdictions. The Court should grant *certiorari* to make sure that Montana and other states adhere to this Court's well-reasoned, modern jurisprudence

and do not subject American manufacturers and other businesses to litigation in places and under laws in violation of their due process rights.

II. STATES THAT DO NOT FOLLOW *DAIMLER* FACILITATE "MAGNET" JURISDICTIONS

If the Court does not grant *certiorari* in this case, it can greatly undermine the central purpose of this Court's general jurisdiction jurisprudence: to assure that the location of a lawsuit does not subvert "traditional notions of fair play and substantial justice." *Daimler,* 134 S. Ct. at 754 (quoting *Int'l Shoe Co.*, 326 U.S. at 316; *accord Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114 (1987) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Here, Mr. Nelson injured his knee in Washington State and Mr. Tyrrell died after exposure to carcinogenic chemicals in South Dakota, Minnesota, and Iowa. Yet, both filed their lawsuits against BNSF in Montana. Montana has become a destination for FELA claims because the Montana Supreme Court has adopted a more liberal interpretation of the statute of limitations than several federal circuits. *See, Anderson v. BNSF Ry.*, 354 P.3d 1248 (Mont. 2015), *cert. denied*, 136 S. Ct. 1495 (2016). Montana courts also have a reputation for "empathizing with injured railroad workers" compared with courts in other states. Paul Bovarnick, *On the Tracks: Helping Injured Railroad Workers*, Trial Lawyer, at 33 (Fall 2012), *at* http://www.rsblaw.net/beta/wp-content/uploads/2015/06/On-the-tracks_helping-injured-rr-workers.pdf. In the case discussed in this article, the attorney explained that finding an excuse to file his client's FELA claim in Montana, not Washington or

Oklahoma, where the client was injured, or Wyoming, where the client lived, generated "a most generous settlement." *Id.* Not surprisingly, BNSF faces at least 32 more FELA claims in Montana courts also brought by out-of-state railroad workers for injuries that have no connection to Montana. Pet. at 24.

Such forum shopping has become all too common. In violation of fair play and justice, manufacturers and other businesses are routinely sued in jurisdictions with little or no connection to the lawsuits. One prominent former plaintiffs' lawyer called these "magnet jurisdictions." Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (quoting Richard Scruggs). A tort reform group is less diplomatic in naming these jurisdictions "Judicial Hellholes." *See* Am. Tort Reform Found., Judicial Hellholes (2015), *at* http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf.

The quintessential example of forum shopping is in asbestos litigation. Any manufacturer with a remote historic connection to an asbestos-containing product or workplace faces lawsuits in Madison County, Illinois, which hosts one-quarter of the nation's asbestos litigation. *See* KCIC, Asbestos Litigation: 2016 Mid-Year Update (2016), at 3, *at* http://riskybusiness.kcic.com/wp-content/uploads/2016/09/KCIC-Asbestos-Mid-Year-Report-2016-1.pdf. Very few of these claims, though, have any connection to Madison County. In 2015, only 75 of 1,224 asbestos cases filed there were on behalf of Illinois residents with only six cases involving Madison County

residents. *See* Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents,* Madison-St. Clair Record, Mar. 23, 2016. Warehousing of claims in chosen jurisdictions is a major reason asbestos litigation, which should have been in decline, is growing in scope and intensity and driving companies into bankruptcy. *See generally* Mark D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11-7 Mealey's Asb. Bankr. Rep. 24 (2012).

For a number of years, Philadelphia, Pennsylvania became the prime location to file lawsuits against pharmaceutical manufacturers. In 2009, the Common Pleas President Judge undertook a "public campaign to lay out the welcome mat for increased mass torts filings." Amaris Elliott-Engle, *Common Pleas Court Seeing More Diabetes Drug Cases*, Legal Intelligencer, Mar. 19, 2009, at 1; *see also* Amaris Elliott-Engle, *Philadelphia Courts May See Substantial Layoffs*, Legal Intelligencer, Jan. 29, 2009 (reporting the plan to make the Complex Litigation Center for mass torts more attractive to attorneys to "tak[e] business away from other courts"). In 2015, out-of-state plaintiffs accounted for 81 percent of new pharmaceutical cases filed in the Philadelphia courts, with that number dipping to 65 percent so far in 2016. *See* Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady*, Legal Intelligencer, July 25, 2016, *at* http://www.thelegalintelligencer.com/latest-news/id=1202763506813/OutofState-Pharma-Filings-Dip-as-Phila-Mass-Torts-Remain-Steady. Local lawyers attribute this decrease to *Daimler*. *See id.* Refusing to grant *certiorari* here, therefore, could reverse these gains.

The City of St. Louis, notwithstanding *Daimler*, is emerging as a new jurisdiction of choice for lawsuits; this is in part due to the state's refusal to adopt the Court's gatekeeper standards for expert evidence. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, Bloomberg Businessweek, Sept. 29, 2016, *at* http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis (reporting that hundreds of out-of-state plaintiffs have brought claims against pharmaceutical and other companies in St. Louis, which has "developed a reputation for fast trials, favorable rulings, and big awards"). The Missouri Office of State Courts Administrator's statistics show that filings in St. Louis have increased from about 3,000 to more than 12,000 claimants from 2014 to 2015. *Compare* FY 2014 Profile 22nd Circuit, Missouri Courts, *at* http://www.courts.mo.gov/file.jsp?id= 83194 *with* FY 2015 Profile 22nd Circuit, Missouri Courts, *at* http://www.courts.mo.gov/file.jsp?id=96374.

In addition, a handful of states host most of the unfair trade practices claims against manufacturers. *See, e.g.*, Dana Herra, *Say Cheese: Class Actions Begin to Pile Up vs Kraft, Walmart over Parmesan Cheese Contents*, Cook County Record, Mar. 1, 2016 (reporting plaintiffs filed consumer lawsuits in New York, California, Missouri, Illinois, Minnesota, and Florida).[3] *Daimler* has proven effective in dismissing or narrowing claims where there is no connection to the state. *See, e.g.*, *Weisblum v. Prophase Labs, Inc.*, 88 F.Supp.3d 283 (S.D.N.Y. 2015) (dismissing con-

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[3] *Available at* http://cookcountyrecord.com/stories/510698243-say-cheese-class-actions-begin-to-pile-up-vs-kraft-walmart-over-parmesan-cheese-contents.

sumer class action fraud claims by California residents for lack of general jurisdiction over defendant while retaining such claims by New York residents).

A troubling consequence of stockpiling hundreds or thousands of claims in magnet jurisdictions, especially when a vast majority of the claims have no connection to the locale, is the increased pressure these filings create to shift a court's focus from dispensing justice to expeditiously disposing of cases. Even well-intentioned judges may take shortcuts to temporarily fix a clogged docket, but ultimately these shortcuts fuel more litigation. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."). These concerns of injustice go to the heart of the fair play and substantial justice reasons that this Court restricted general personal jurisdiction to the state in which a business is "at home."

Amicus appreciates that this Court cannot completely eliminate forum shopping or the resulting injustices that occur in these jurisdictions. But, there are clear cases, such as the one at bar, that have no connection to the forum state or where the defendant is "at home." This type of litigation tourism must be grounded. These lawsuits violate this Court's jurisdictional safeguards, and failure to grant *certiorari* will encourage this unconstitutional practice.

III. THE COURT SHOULD RESPOND TO RULINGS THAT IMPROPERLY LIMIT *DAIMLER*

The Court should also grant the Petition to ensure the constitutional protections this Court set forth in *Daimler* and *Goodyear* are not improperly denied to domestic companies or trumped by statute. These protections are rooted in the U.S. Constitution's due process clause and, therefore, must apply to domestic and foreign disputes alike and cannot be altered by federal law establishing concurrent subject matter jurisdiction over claims in state courts.

A. This Court Should Clarify That *Daimler* Applies to All Litigation, Not Just Disputes Arising Outside the United States

Manufacturers and other companies based outside the United States must not be given protections under the U.S. Constitution that are not provided to their domestic counterparts.

In this case, the Montana Supreme Court seized on the foreign nature of the disputes in *Goodyear* and *Daimler* to find the Court's "at home" limitation applies only to "a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6 (Mont. 2016) (quoting *Daimler*, 134 U.S. at 750). *Goodyear* arose out of a bus accident in France where the allegedly defective tire was made and sold abroad. *Daimler* arose in the context of an Alien Tort Statute claim involving Argentinean plaintiffs against a German corporation. Yet, nothing in these opinions limits the application

of constitutional constraints on general jurisdiction to claims that arise outside the United States.

As the Petitioner shows, this unduly narrow reading of *Daimler*, which precludes its application in purely domestic cases, directly or implicitly conflicts with at least eleven other court decisions. Pet. Br. at 11-13. For example, the Delaware Supreme Court has properly found that "it is not tenable" after *Daimler* to exert personal jurisdiction over a manufacturer where the claims "had nothing to do with its activities in Delaware," merely because the corporation registered to do business and appointed a registered agent to receive service of process in that state. *Genuine Parts Co v. Cepec*, 137 A.3d 123, 125-26 (Del. 2016) (finding no personal jurisdiction over manufacturer incorporated in Georgia with principal place of business in Atlanta in asbestos claim brought by Georgia plaintiff who worked in Florida warehouse). Before *Daimler*, out-of-state plaintiffs with no meaningful connection to Delaware had increasingly filed asbestos claims there. *See In re Asbestos Litigation*, 929 A.2d 373, 378 (Del. 2006) (finding out-of-state asbestos claims filed in Delaware courts began in May 2005 and quickly reached 129 claims). *Daimler* reversed that trend. *See* KCIC, Asbestos Litigation, *supra*, at 5 (finding asbestos claims filed in New Castle, Delaware fell from 219 in 2014 to 124 in 2015, a decline of 43.4%).

The Montana Supreme Court's decision is also in conflict with a California Supreme Court decision that found that its courts did not have general jurisdiction over claims brought by out-of-state plaintiffs against a pharmaceutical manufacturer that was neither incorporated nor headquartered in Califor-

nia. *See Bristol-Myers Squibb Co. v. Super. Ct. (Anderson)*, 377 P.3d 874, 879, 883-84 (Cal. 2016). There, the California Supreme Court applied a comparative approach to examining the manufacturer's contacts with the forum state, but nevertheless found specific jurisdiction over the claims. *See id.* (finding although the manufacturer registered to do business, maintained an agent for service, employed over 400 people, and sold 187 million of the pills at issue in California, its California operations were less extensive than its activities elsewhere in the United States).

If not corrected by this Court, *Tyrrell* will establish a beachhead for plaintiffs in their continued attempts to eviscerate *Daimler* by limiting it "to overseas, non-American plaintiffs, an overseas corporate defendant, or both." *See* William R. Hanlon & Richard M. Wyner, Commentary: *Daimler Turns Two: Personal Jurisdiction Over Out-Of-State Mass Tort Defendants in the Wake of Daimler AG v. Bauman*, Mealey's Litig. Rep.: Asbestos, vol. 31, no. 5, Apr. 13, 2016. Such a result has no legal basis and would put American businesses at a competitive disadvantage.

B. The Court Should Separate Concurrent Subject Matter Jurisdiction and Statutory Venue Requirements from the Constitutional Floor for General Jurisdiction

The Montana Supreme Court also created an exemption from the Court's personal jurisdiction jurisprudence for FELA claims. Its reasoning for doing so—that a federal statute broadly empowers state courts to decide certain cases, regardless of constitutional safeguards—is deeply flawed. If other courts follow this reasoning, then federal and state laws establishing venue for various types of claims could be

misread to overcome the lack of any connection among the claim, defendant, and state that is needed for personal jurisdiction.

It is a basic principle that plaintiffs must establish subject matter jurisdiction, personal jurisdiction over the defendant, and venue—customarily, though not necessarily, in that order. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). "[P]ersonal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (citing C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3801, pp. 5-6 (1976)).

FELA merely provides that state courts have concurrent subject matter jurisdiction with the federal courts in deciding cases involving injuries to railroad workers. *See* 45 U.S.C. § 56. The statute broadly provides that a FELA action "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.* This language provides a venue rule as to where such claims may be heard in federal court. *See Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941) (recognizing Section 56 "establishes *venue* for an action in the federal courts") (emphasis added)); *see also Imm v. Union R. Co.*, 289 F.2d 858, 859 (3d Cir. 1961) (agreeing with railroad that 45 U.S.C. § 56 "is a venue provision and does not have anything to do with jurisdiction"). The statute also provides concur-

rent subject matter jurisdiction over FELA claims in federal and state courts. *See* 45 U.S.C. § 56.

Due process rights cannot be reduced or eliminated by statute. This principle is universally understood in the context of state long-arm statutes. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984) (considering whether Texas long-arm statute reached beyond what the Due Process Clause of the Fourteenth Amendment permits). A statute, such as FELA, cannot be read to broadly establish personal jurisdiction over defendants in state court, which requires a case-by-case constitutional inquiry. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis."). Congress's grant of subject matter jurisdiction also cannot be seen as an excuse to "enlarge or regulate the jurisdiction of state courts." *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 56-57 (1912). No precedent of this Court has ever held that Congress has the power to affect the personal jurisdiction of state courts at all. FELA and other statutes can authorize states to exercise jurisdiction only when consistent with the U.S. Constitution.

"As a general rule, neither statute nor judicial decree may bind strangers to the state." *Nicastro*, 564 U.S. at 880. In products liability cases against manufacturers, for example, "it is the defendant's purposeful availment [of the benefits and protections of state law] that makes jurisdiction consistent with 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe*, 326 U.S. at 316). As the Court found in *Goodyear* and reinforced in *Daimler*, a cor-

poration submits to general or all-purpose jurisdiction only in the states in which it is incorporated or establishes its principal place of business (or a surrogate principal place of business). It is not subject to personal jurisdiction everywhere its goods routinely flow. *See Nicastro*, 564 U.S. at 882; *Daimler*, 134 U.S. at 760-61.

By denying *Daimler* safeguards to U.S. businesses and exempting certain statutory claims, the Montana Supreme Court's ruling creates exceptions to this Court's general jurisdiction jurisprudence that would overtake the Court's rule of law. The Court should grant *certiorari* here to make sure that its rulings are applied properly and to their full extent.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court grant the Petition for Writ of Certiorari.

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No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2, Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner, BNSF Railway Company. Although Counsel for petitioner consented to the filing of WLF's brief, Counsel for respondents stated that, on behalf of their clients, they "must oppose amicus." Accordingly, this motion for leave to file is necessary.

WLF's *amicus* interests are more fully set out in its accompanying brief. In short, WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in federal and state courts in cases implicating due-process limitations on a court's authority to exercise personal jurisdiction over an out-of-state defendant. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of personal jurisdiction are *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016).

WLF favors strict adherence to the due-process limitations this Court recognized in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) on the judiciary's exercise of personal jurisdiction over out-of-state defendants. WLF fears that the statutory

rationale for personal jurisdiction adopted by the Montana Supreme Court below—if allowed to stand—will erode defendants' due-process rights in cases brought under the Federal Employers' Liability Act. Accordingly, WLF's brief urges the Court to grant the petition to clarify that the Due Process Clause of the Fourteenth Amendment unequivocally bars state courts from exercising general jurisdiction over nonresident defendants in such cases.

WLF believes that the arguments set forth in its brief will assist the Court in evaluating the issues presented by the petition. WLF has no direct interest, financial or otherwise, in the outcome of this litigation. Because of its lack of any direct interest, WLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate in this case as *amicus curiae* by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state court may decline to follow this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not "at home" in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.

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James M. Beck, *Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after* Daimler AG v. Bauman, WLF Working Paper (Nov. 2015) 1, 2

Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 Tex. L. Rev. 1589 (1992)..... 15

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The Federalist No. 45 (James Madison)..... 14

Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444 (2010) 20

James Kent, *Commentaries on American Law* (1826) 11

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Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 Stan. J. Complex Litig. 1 (2014) 14

Mark Moller, *Contra Plaintiffs' Bar, Registering To Do Business Does Not Create General Jurisdiction*, WLF Legal Opinion Letter (June 10, 2016) 1

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INTERESTS OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in federal and state courts in cases implicating due-process limitations on a court's authority to exercise personal jurisdiction over an out-of-state defendant. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016); *Figueroa v. BNSF Ry. Co.*, No. S063929 (Or. Sup. Ct., dec. pending).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles concerning due-process constraints on the judiciary's exercise of personal jurisdiction. *See, e.g.*, Mark Moller, *Contra Plaintiffs' Bar, Registering To Do Business Does Not Create General Jurisdiction*, WLF Legal Opinion Letter (June 10, 2016); Eric L. Alexander, *Plaintiffs Cannot Skirt* Daimler AG v. Bauman *with "Pendent Jurisdiction" Theory*, WLF Legal Opinion Letter (Apr. 1, 2016); James M. Beck,

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for WLF notified counsel of record for all parties of WLF's intention to file.

Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after Daimler AG v. Bauman, WLF Working Paper (Nov. 2015).

This Court's landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), made clear that state and federal courts lack personal jurisdiction over a corporate defendant unless (1) that defendant's activities within the forum state give rise to the claims being asserted or (2) the corporation is "at home" in the forum state. In sharply curtailing its prior "continuous, substantial, and systematic" rationale for general personal jurisdiction, *Daimler* clarified that a corporation, even one that conducts "continuous, substantial, and systematic" business in all 50 states, can be deemed "at home" in no more than one or two states: its state of incorporation and its principal place of business (or its surrogate principal place of business).

WLF favors strict adherence to *Daimler*'s due-process limitations on the judiciary's exercise of personal jurisdiction over out-of-state defendants. WLF is concerned that the statutory rationale for personal jurisdiction adopted by the Montana Supreme Court—if allowed to stand—will erode the due-process rights of defendants and render *Daimler* a dead letter in all cases brought under the Federal Employers' Liability Act. WLF thus urges the Court to grant certiorari to clarify that the Due Process Clause of the Fourteenth Amendment unequivocally bars state courts from exercising general jurisdiction over nonresident defendants in such cases. Such clarity is needed to provide companies that have a multi-state presence some minimal assurance as to where their conduct will render them liable to suit.

STATEMENT OF THE CASE

BNSF Railway Company (BNSF) is a leading freight railway carrier in the United States. Incorporated in Delaware, BNSF's principal place of business is Ft. Worth, Texas. *See* Pet. App. 3a. Although BNSF operates in 28 states, including Montana, *none* of BNSF's corporate officers or departments is located in Montana. *Id.* at 63a.

Respondents Kelli Tyrrell and Robert Nelson—neither of whom are residents of Montana—brought separate suits against BNSF in Montana state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, alleging that BNSF's negligence caused them to sustain injuries while working for BNSF. Pet. App. 1a-4a. Respondents do not allege that they ever lived or worked in Montana; nor do they allege that they suffered any injury in Montana. *Ibid.*

Given respondents' bare jurisdictional allegations, BNSF moved to dismiss each suit on the basis that Montana state courts cannot exercise general jurisdiction over it consistent with the due-process constraints this Court recognized in *Daimler*. The trial court in *Tyrrell* denied BNSF's motion and certified its ruling as final, allowing BNSF to seek discretionary appeal. Pet. App. 41a-46a, 47a-73a. In *Nelson*, the trial court granted BNSF's motion to dismiss, and the plaintiff appealed from that ruling as of right. *Id.* at 36a-40a. The Montana Supreme Court accepted BNSF's appeal in *Tyrrell*, which it then consolidated with *Nelson*. *Id.* at 34a-35a.

A divided Montana Supreme Court "decline[d]" to apply *Daimler*, which it dismissively viewed as "factually and legally distinguishable." Pet. App. 15a. Because *Daimler* was "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States," the court deemed it inapplicable here, where "all the parties involved are citizens of the United States." Pet. App. 11a. Most significantly for the court, *Daimler* "did not involve a railroad claim or a railroad defendant." *Ibid.*

Invoking FELA's venue provision, 45 U.S.C. § 56—which establishes venue for FELA cases filed "in a district court of the United States" and provides state courts with "concurrent jurisdiction" over such claims—the Montana Supreme Court cited cases purportedly showing that *this* Court "consistently has interpreted [§] 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a, 12a-13a. Because *Daimler* "did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business,'" *id.* at 12a, the court concluded that the Montana courts' exercise of personal jurisdiction fully "comports with the due process clause." *Id.* at 17a-18a.

Justice McKinnon dissented at length. Pet. App. 20a-30a. Criticizing the majority for improperly circumventing this Court's holding in *Daimler*, she pointed out that this Court's FELA precedents relied on by the majority "do not so much as mention the Due Process Clause or general jurisdiction." *Id.* at

27a. She went on to explain that § 56 of FELA "is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts." *Id.* at 29a. Regardless of FELA, Justice McKinnon concluded that "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." *Id.* at 31a.

SUMMARY OF ARGUMENT

Among the bedrock freedoms protected by the Due Process Clause is the freedom not to be haled into court indiscriminately. This case arises from injuries respondents allegedly sustained outside of Montana while working for BNSF—a railway company incorporated in Delaware and headquartered in Texas. None of the events giving rise to respondents' claims occurred in Montana, and no party in this case is a citizen or resident of Montana. Nonetheless, the Montana Supreme Court held that BNSF can be sued in Montana by nonresident plaintiffs for claims that have no connection whatsoever to Montana.

Contrary to the Montana Supreme Court, FELA's venue provision, 45 U.S.C. § 56, does not provide an independent basis for personal jurisdiction in this case. On its face, the first sentence of § 56 applies only to "court[s] of the United States," not to state courts, and nothing in FELA purports to define the *in personam* jurisdictional reach of *state* courts. FELA also provides for concurrent subject-matter jurisdiction of *claims* for state and federal courts, but FELA does not alter or expand the authority of state courts to

exercise personal jurisdiction over *persons*.

Nor *could* FELA expand the personal jurisdiction of the state courts. Under the Supremacy Clause, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse Montana courts from their duty to accord every defendant haled before them with due process of law. Indeed, the Montana Supreme Court's interpretation of FELA as somehow permitting Montana courts to exercise general personal jurisdiction over BNSF in this case cannot be squared with the due-process limitations on personal jurisdiction recognized by this Court in *Daimler AG v. Bauman*. And whatever the extent of Congress's authority to expand the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the jurisdictional reach of *state* courts. Simply put, FELA cannot abrogate the sovereignty of the states, nor can it alter the Constitution's deliberate framework of interstate federalism.

Lastly, if the Montana Supreme Court's erroneous view of *Daimler* is allowed to stand, it will enable FELA plaintiffs, like those here, to shop their claims to forums with no connection to those claims. Such forum shopping distorts the civil justice system by creating inefficiencies when cases are litigated far from the location of the parties, the alleged tortious conduct, and the evidence—all while subjecting defendants to the cost and inconvenience of having to litigate in a distant location. By permitting plaintiffs whose suits have no relationship to Montana to subject a nonresident defendant to suit there, the decision below rewards improper forum shopping and invites further abuse.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CLARIFY THAT FELA DOES NOT SUPPLANT BEDROCK DUE-PROCESS LIMITATIONS ON STATE COURTS' EXERCISE OF PERSONAL JURISDICTION

As the petition ably demonstrates, the Montana Supreme Court's holding exacerbates an existing split among the states' highest courts on whether FELA confers state courts with personal jurisdiction over any defendant "doing business" in the state, obviating the need for a due-process analysis under the Fourteenth Amendment.[2]

Given this intractable and widening split among the states, only this Court's review can provide a single, national, and uniform interpretation of FELA that is consistent with the Court's understanding of the Due Process Clause's

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[2] *Compare MacKinnon v. St. Louis S.W. Ry. Co.*, 518 So. 2d 89, 93 (1987) (holding that "'actually carrying on railroading' in this state" is "sufficient to invoke [personal] jurisdiction under FELA"), *with Norfolk S. Ry. Co. v. Maynard*, 437 S.E.2d 277, 280-81 (W. Va. 1993) (holding that FELA imposes limitations on where an action may be brought "[i]n addition to the requirements for *in personam* jurisdiction outlined in *International Shoe* and its progeny"), *S. Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 362-63 (Miss. 1992) ("Nothing in [FELA] addresses the matter of personal jurisdiction in the state court."), *and Hayman v. S. Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955) (affirming dismissal of plaintiff's action under FELA because, even though the defendant was "doing business" in Missouri, exercising personal jurisdiction over that defendant was inconsistent with due process).

constraints on personal jurisdiction as articulated in *Daimler*. As demonstrated below, review is also warranted because the Montana Supreme Court's holding is contrary to the plain language of FELA and this Court's own precedents interpreting it. And even if Congress desired—under FELA, or otherwise—to expand the general personal jurisdiction of state courts so as to reach defendants who are not "at home" in the forum state, it could not permissibly do so.

A. FELA Does Not Purport to Alter or Expand the Personal Jurisdiction of State Courts

In enacting FELA, Congress clearly did not extend the bounds of state courts' general personal jurisdiction over nonresident defendants. Section 56 of FELA provides:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56. To the extent that § 56 delineates possible venues for a FELA action, that delineation has *nothing* whatsoever to do with personal jurisdiction.

As a preliminary matter, limits on venue should not be mistakenly conflated with constitutional limits on personal jurisdiction. Venue assesses whether litigation in a particular geographic location is appropriate, whereas personal jurisdiction considers whether a particular governmental body's courts can compel the defendant to appear. Accordingly, "the question of whether venue within the state's borders would be burdensome is analytically distinct from the question of which governments can compel a defendant to appear within those borders." Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After* Walden v. Fiore, 19 Lewis & Clark L. Rev. 769, 780 (2015).

For that reason, this Court has explained that "[t]he question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *see also Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) ("The question [for personal jurisdiction] is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant."). Because proper venue is a necessary but not sufficient condition for a court's exercise of personal jurisdiction, a statute that merely delineates a number of potential venues assumes *nothing* about the existence of personal jurisdiction over any given defendant.

Moreover, under any plausible reading of

FELA, the simple fact that this case is pending in *state* court, rather than *federal* court, is entirely dispositive of the question presented. On its face, § 56's authorization to bring an action wherever a defendant is "doing business" applies only "in a district court of the United States," not any court located *within* the United States. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

As this Court has explained recently, federal venue statutes reflect Congress's intent "that venue should always lie in *some federal court* whenever *federal courts* have personal jurisdiction over the defendant." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 578 (2013) (second emphasis added). And the fact that "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons," *Daimler*, 134 S. Ct. at 753, further undermines any contention that § 56 provides an independent basis for a Montana court to exercise personal jurisdiction over BNSF in this case. Simply put, nothing in FELA purports to define the *in personam* jurisdictional reach of *state* courts.

Nor does § 56's perfunctory grant of "concurrent jurisdiction" over FELA claims to the "courts of the several States" alter the personal jurisdiction analysis in any way. The concept of "concurrent jurisdiction" extends to *claims*, not *persons*, and has always been understood to refer to subject-matter jurisdiction, *not* personal jurisdiction.

See, e.g., Haywood v. Drown, 556 U.S. 729, 747 (2009) ("[T]he state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally *over the subject matter*.") (quoting 1 James Kent, *Commentaries on American Law* 374-75 (1826) (emphasis added)); *Growe v. Emison*, 507 U.S. 25, 32 (1993) (noting that "federal courts and state courts often find themselves exercising concurrent jurisdiction *over the same subject matter*") (emphasis added).

Stated differently, "concurrent jurisdiction" simply grants state courts the "authority" to "adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). For that reason, courts have interpreted § 56's grant of "concurrent jurisdiction" to the states as a grant of subject-matter jurisdiction over FELA claims, not a grant of personal jurisdiction over out-of-state defendants. *See In re CSX Transp., Inc.*, 151 F.3d 164, 166 (2d Cir. 1998) (explaining that § 56 "confers concurrent federal and state jurisdiction over FELA *claims*") (emphasis added).

This Court has stated explicitly that § 56 is not an "attempt by Congress to enlarge or regulate the [personal] jurisdiction of state courts or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912). Rather, in granting "concurrent jurisdiction" over FELA to the state courts, Congress sought to disabuse any notion that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts." *Ibid*; *See Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377, 387 (1929) ("As to the grant of jurisdiction in [FELA,]

that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned."). Thus, § 56 grants subject-matter jurisdiction over FELA claims to the state courts, but only "when their [personal] jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers*, 223 U.S. at 55.

B. FELA Cannot Be Construed as Expanding the Reach of State Courts' Personal Jurisdiction

The Montana Supreme Court's approach to personal jurisdiction in this case is a relic of the pre-*Daimler* era, in which many state and federal courts permitted large corporations to be sued in any state in which they maintained a significant presence. But *Daimler* leaves no doubt that Montana courts cannot, consistent with due process, subject a nonresident defendant to suit for claims that have no connection whatsoever to Montana. Where, as here, specific jurisdiction over a corporate defendant is lacking, general jurisdiction may be exercised only if the corporation's contacts with Montana are so extensive as to render it "at home" there.

Before any court can assert personal jurisdiction over a defendant in a federal question case, that court must first determine whether the exercise of jurisdiction "comports with the limits imposed by federal due process." *Daimler*, 134 S. Ct. at 753. The Montana Supreme Court's decision thus expands the scope of general personal jurisdiction well beyond its constitutional bounds. By authorizing out-of-state defendants to be sued in a

forum without regard to whether they are "at home" there—even though the plaintiff's claims bear *no* relationship to that forum—the decision below collides with the vital due-process limitations on personal jurisdiction this Court recognized in *Daimler*.

FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse state courts from their duty to accord defendants appearing before them with due process of law. *See* U.S. Const. amend. XIV, § 1. Even if FELA explicitly provided for personal jurisdiction in this case—and it obviously does not—that would not dispose of the constitutional limits imposed by due process. Like all federal statutes, FELA is "subject to the requirements of * * * the Due Process Clause," *Maresse v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985), and Congress has "no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

Indeed, serious constitutional concerns would arise if this court were to interpret FELA as somehow permitting Montana courts to exercise general personal jurisdiction over BNSF in this case. To avoid any entanglement with those questions, the Court should grant review to interpret FELA as consistent with the bright-line rule announced in *Daimler*: state courts lack general personal jurisdiction over a corporate defendant unless that defendant is "at home" in the state.

1. Whatever the extent of Congress's authority to establish the bounds of personal jurisdiction for

federal courts, it surely cannot alter the jurisdictional reach of *state* courts. This distinction is significant because the "first principle" of the Constitution is that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *The Federalist* No. 45 (James Madison)).

As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Ibid.* The federal government is not granted "an indefinite supremacy over all persons and things," *The Federalist* No. 39 (James Madison), nor does the Constitution "confer upon Congress the ability to require the States to *govern* according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (emphasis added).

"Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts." Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 Stan. J. Complex Litig. 1, 19 (2014). Indeed, as Justice Frankfurter explained:

> Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that [apply] for every other litigant who seeks access to its courts.

* * * * *

> The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant legislation in that field, but *not* in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress.

Brown v. Gerdes, 321 U.S. 178, 190, 193 (1944) (Frankfurter, J., concurring) (emphasis added).

Although the Constitution imposes only due-process limitations on the exercise of personal jurisdiction by *federal* courts, it imposes both due-process *and* territorial limitations on the exercise of personal jurisdiction by *state* courts. *See, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 16 (2006) ("Despite the due process focus, the U.S. Supreme Court has never wholly discarded taking sovereignty concerns into account in its personal jurisdiction analysis."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 Tex. L. Rev. 1589, 1591 (1992) ("It is now reasonably clear that the source [of constitutional limitations on state court jurisdiction] is not just the Due Process Clause.").

Indeed, this Court has made clear that the Constitution imposes unique *territorial* constraints

on the exercise of personal jurisdiction by state courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. Personal jurisdiction also "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980) ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

These principles of interstate federalism "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). So "when it comes to federal *legislative* power concerning *state judicial* power, state boundaries have constitutional significance." Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1119 (1993).

While due process constrains the authority of both federal and state courts to reach across geographic borders to exercise personal jurisdiction over defendants and controversies arising outside their borders, the geographic boundaries of the United States are vastly larger than those of any one state. *See Nicastro*, 564 U.S. at 884 (plurality opinion) ("For [general] jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual state."). "Regardless of who is doing

the legislating, the relevant boundaries are those of the sovereign that has created the court." Steinman, *supra*, at 1119.

So even if Congress wanted to expand the general personal jurisdiction of state courts so as to reach FELA defendants who are not "at home" in the forum state, it could not do so. Simply put, FELA cannot abrogate the sovereignty of the states, nor can it alter the Constitution's deliberate framework of interstate federalism. As Justice Kennedy has cautioned, allowing the wrong state to exercise jurisdiction over the citizens of another state "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *Nicastro*, 564 U.S. at 884 (plurality opinion).

2. Authorizing a state court to exercise general jurisdiction over every railway company "doing business" in the state would not only violate the Due Process Clause and disregard the sovereignty of the states, it would also destroy the very predictability that *Daimler* sought to provide by ensuring that companies are able to structure their affairs with some confidence of not being haled into court unexpectedly.

Among other things, due-process limitations on personal jurisdiction confer "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Such "[p]redictability is valuable to

corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

A corporation's place of incorporation and principal place of business—the two jurisdictions where a corporation is always "at home" under *Daimler*—"have the virtue of being unique." *Daimler*, 134 S. Ct. at 760. That is, "each ordinarily indicates only one place"—a forum that is "easily ascertainable." *Ibid.* This Court's bright-line rule in *Daimler* thus provides corporations with the predictable assurance that they will be subject to general jurisdiction in only one or two well-defined jurisdictions.

In contrast, most railway companies are "doing business" in any number of states. Permitting those activities to suffice for general jurisdiction would allow those companies to be sued in Montana by *any* plaintiff on *any* FELA claim arising *anywhere*. Railway carriers would be completely unable to predict where any particular claim might be brought. Such unprecedented expansion of states' personal jurisdiction over nonresident defendants would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp.*, 471 U.S. at 472).

* * *

In sum, because § 56 of FELA does not authorize state courts to exercise general jurisdiction over nonresident defendants—nor could it—the petition for certiorari should be granted.

II. REVIEW IS WARRANTED TO ENSURE THAT THE DECISION BELOW DOES NOT INCENTIVIZE FURTHER FORUM SHOPPING

No matter their reasons, if the nonresident plaintiffs in this case both found it advantageous to bring their FELA claims in Montana courts, other plaintiffs contemplating FELA suits in other states will too. Indeed, "[t]here are currently 32 cases against BNSF pending in Montana state courts brought by FELA plaintiffs who are not Montana residents, who were not injured in Montana, and who do not allege *any* Montana-related acts or omissions." Pet. at 24. Permitting the Montana Supreme Court's elastic approach to general jurisdiction to stand would doubtlessly invite and encourage even more plaintiffs from across the country to come to Montana to pursue the same harmful forum-shopping strategy. But *Daimler* has significantly cabined the exercise of general jurisdiction over nonresident defendants, and this Court should look askance at state courts that invite forum shopping by baling nonresident defendants into forums unrelated to the plaintiff's claims.

As this Court has explained, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—*not* the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (emphasis added). Yet permitting a nonresident plaintiff whose claims have no relationship to the forum state to compel an out-of-state defendant to defend a lawsuit in that state rewards improper forum shopping and invites further abuse. Given the forum-shopping

implications of the Montana Supreme Court's holding, it is all the more urgent that this Court grants review to ensure that the decision below does not incentivize similar behavior by future plaintiffs.

Such forum shopping serves no useful purpose and is deeply unfair to litigants. This Court has long recognized that "it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in" a particular court. *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). And empirical research confirms that forum shopping can affect the outcome of cases because the forum in which a case proceeds very often impacts the result. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507, 1507 (1995) (analyzing three million cases terminated over 13 years and finding that "plaintiffs' rate of winning drops from 58% in cases in which there is no transfer [of venue] to 29% in transferred cases"—an effect that "prevails over the range of substantively different types of cases").

Forum shopping also damages the integrity of the civil justice system itself. "Forum shopping can be harmful to the legal system by distorting the substantive law, by showcasing the inequities of granting plaintiffs an often outcome-determinative choice among many district courts, and by causing numerous economic inefficiencies, including inconveniences to the parties." Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1445 (2010). Allowing plaintiffs to have their suits tried and decided in more favorable but far-flung forums can often result in "magnet jurisdictions." Such jurisdictions impose unwelcome administrative

burdens on the courts and undermine localized interests in procuring justice. As this Court has noted:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upor the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

Although the Montana Supreme Court concluded that "FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes," Pet. App. 5a, refusing to sanction forum shopping does not work an injustice against railroad employees. While applying the rule announced in *Daimler* may limit the number of state forums in which FELA plaintiffs may bring their claims, it does nothing to undermine the "humanitarian and remedial purposes" of FELA. Even under *Daimler*, for example, the plaintiffs in this case would still have at least three viable forums within which to bring their claims: the state where they allegedly

sustained their injury, Delaware, and Texas.

If plaintiffs have unfettered discretion to sue corporations in any state in the country where the defendant is "doing business," then plaintiffs will be free to shop claims to any forum their counsel views as more plaintiff-friendly. The forum-shopping incentives implicated here provide yet another reason for the Court to grant review and reject the Montana Supreme Court's sweeping theory of personal jurisdiction.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition.

Respectfully submitted,

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October 28, 2016

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SUPREME COURT, U.S.

No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Montana

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
SEPTEMBER 28, 2016
CERTIORARI GRANTED JANUARY 13, 2017

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The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

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Office of the Clerk of the Supreme Court

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CLERK

PUBLIC VIEW DOCKET

Case Information

Case Number: DA 14 140825
Jurisdiction: Supreme Court
Original Court: Yellowstone County District Court
Case Type: Direct Appeal – Personal Injury/Death
Short Title: Tyrrell & Nelson v. BNSF
Full Title: KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRRELL (deceased), Plaintiff and Appellee, v. BNSF RAILWAY CO., a Delaware corporation, Defendant and Appellant.
ROBERT M. NELSON, Plaintiff and Appellant, v. BNSF RAILWAY CO., a Delaware corporation, Defendant and Appellee.
Citation: 2016 MT 126
Case Filing Date: 12/31/2014
Origination Court Case Number: DV 14-0699

Appellate Role	Party Name	Comment	Attorney(s)
Appellant	BNSF Railway Company	--	Randy J. Cox, Michelle T. Friend, Jesse Myers, Jeffrey Wayne Hedger,

Appellate Role	Party Name	Comment	Attorney(s)
			Jaclyn S. LaFerriere,
			Chad M. Knight,
			Cash K. Parker,
			Anthony Michael Nicastro,
			Scott M. Stearns
Appellee	Kelli Tyrrell	--	Fredric A. Bremseth,
			Keith Edward Ekstrom
Appellee	Robert M. Nelson	--	Bob Fain,
			Christopher Moreland

Register of Action

Document Description	Filing Date
Notice - Incoming - U.S. Sup. Ct. Cert. Filed	10/03/2016
* * *	
Event – Case Closed	06/16/2016
Notice – Outgoing – Opinion Release Notice Issued	06/16/2016
Notice – Outgoing – Remittitur Issued	06/16/2016
Notice of Corrected Opinion.	06/07/2016
Opinion – Published (Justice Shea; Affirmed in part, reversed in part, and remanded. Justice McKinnon dissenting)	05/31/2016
Letter from Boone Karlberg (Randy J. Cox) regarding notice of supplemental authority. copies to Court.	05/06/2016
Notice – Incoming - BNSF's Supplemental Authority – copies to Court	04/25/2016
Notice – Incoming - Tyrell/Nelson Supplemental Authority copies to Court	04/25/2016
Notice – Incoming - BNSF's Supplemental Authority – copies to Court	04/19/2016

Notice – Incoming - BNSF's Supplemental Authority (copies to court)	02/19/2016
Event – Oral Argument Presented by Randy Cox for the appellant and Christopher Moreland for the appellee. The matter was taken under advisement at 10:45 a.m.	12/09/2015
* * *	
Brief – Appellant Reply	09/11/2015
Brief – Amicus (Montana Chamber of Commerce)	07/31/2015
* * *	
Brief – Appellee's Response	07/15/2015
* * *	
Brief – Appellant's Opening	04/15/2015
Order – Consolidating Cases and setting briefing schedule (BNSF's Opening Brief – April 15, 2015; Nelson/Tyrrell's Consolidated Answer Brief June 15, 2015; BNSF's Reply Brief June 29, 2015)	03/03/2015
Motion – Unopposed – Consolidate and for Briefing Schedule sent to Court w/SC File	03/03/2015
* * *	
Order – this appeal shall proceed in accordance with the Montana Rules of Appellate Procedure.	01/13/2015

Event – Sent to Court – Pleading (notice of appeal with Rule 54(b) certification)	01/05/2015

* * *

Notice – Incoming – Notice of Appeal with Rule 54(b) Certification.	12/31/2014

Yellowstone County District Court
Case Register Report
DV-56-2011-0000417-PI
Robert M Nelson vs. BNSF Railway Company

Filed: 3/10/2011
Subtype: Personal Injury/Death

Status History

Open	3/10/2011
Closed	11/21/2014
Remanded to other court	6/21/2016
Appeal remanded from Supreme Court	6/21/2016
Reopened	6/21/2016
Inactive	1/26/2017

Plaintiffs

Pl. no. 1 Nelson, Robert M

Attorneys

Young, Chris R.	(No longer on case)	Do Not Send Notices
Ingebritson, Russell A.	(No longer on case)	Do Not Send Notices
Fain, Bob	(Primary attorney)	Send Notices

Defendants

Def. no. 1 BNSF Railway Company

Judge History

Date	Judge	Reason for Removal
3/10/2011	Baugh, G. Todd	Retired
1/8/2015	Souza, Rod	Current

Register of Actions

Doc. Seq.	Filed	Text	Judge
1	03/10/2011	Complaint and Jury Demand	Baugh, G. Todd
2	03/10/2011	Summons Issued: (BNSF Railway Company) (R&F 02/28/2014)	Baugh, G. Todd
		* * *	
6	02/28/2014	Service of Summons (02/27/2014)	Baugh, G. Todd
7	03/20/2014	BNSF's Motion To Dismiss For Lack Of Personal Jurisdiction And Brief In Support	Baugh, G. Todd
		* * *	
11	04/15/2014	Plaintiff's Response To Defendant's Motion To Dismiss	Baugh, G. Todd
		* * *	
18	05/15/2014	FAX COPY: BNSF's Reply Brief In Support Of Its Motion To Dismiss For Lack Of Personal Jurisdiction	Baugh, G. Todd

19	06/27/2014	Plaintiff's Motion For Permission To File Supplemental Brief To Plaintiff's Response To Defendant's Rule 12(b)(2) Motion To Dismiss Or Set Briefing Schedule Relative Thereto	Baugh, G. Todd
20	06/27/2014	Plaintiff's Supplemental Memoranda Regarding The Commerce Clause And/Or Request For Briefing Schedule	Baugh, G. Todd
21	07/11/2014	Defendant's Response To Plaintiff's Motion For Permission To File Supplemental Brief	Baugh, G. Todd
22	11/13/2014	BNSF's Request for Statement of Damages	Baugh, G. Todd
23	11/20/2014	Memorandum and Order (Def's motion GRANTED case Dismissed)	Baugh, G. Todd
24	12/02/2014	Defendant BNSF Railway Company's Notice of Entry of Order	Baugh, G. Todd

25	12/31/2014	***EMAIL COPY***Notice of Appeal (Replaced with Original 01/02/15)	Souza, Rod
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27	06/21/2016	Supreme Court Opinion	Souza, Rod
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29	01/18/2017	Defendant BNSF's Motion to Stay Brief in Support	Souza, Rod
30	01/25/2017	Plaintiff's Response to BNSF's Motion to Stay	Souza, Rod
31	01/26/2017	Order (RE: All Proceedings Are Stayed)	Souza, Rod

Yellowstone County District Court
Case Register Report
DV-56-2014-0000699-PI
Kelli Tyrrell, Ad Estate of Brent Tyrrell vs. BNSF Railway Company

Filed: 5/19/2014
Subtype: Personal Injury/Death

Status History

Open	5/19/2014
Remanded to other court	6/21/2016
Appeal remanded from Supreme Court	6/21/2016

Plaintiffs

Pl. no. 1 Kelli Tyrrell, Ad Estate of Brent Tyrrell,

Attorneys

Bremseth, Fredric A	(Primary attorney)	Send Notices

Defendants

Def. no. 1 BNSF Railway Company

Attorneys

Parker, Cash K	(Primary attorney)	Send Notices

Judge History

Date	Judge	Reason for Removal
5/19/2014	Gustafson, Ingrid	Substituted
7/7/2014	Moses, Michael G.	Current

Register of Actions

Doc. Seq.	Filed	Text	Judge
1	05/16/2014	Complaint and Jury Demand	Gustafson, Ingrid
2	05/19/2014	Summons Issued:	Gustafson, Ingrid
3	07/02/2014	FAX COPY: Defendant's Rule 12(b)(2) Motion to Dismiss For Lack of Personal Jurisdiction Original received 7/7/14	Moses, Michael G.
4	07/07/2014	Defendant's Corporate Disclosure Statement	Moses, Michael G.
		* * *	
8	07/21/2014	Plaintiff's Memorandum of Law in Opposition to Defendant's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction	Moses, Michael G.
9	07/24/2014	Affidavit fo [*sic*] Fredric A. Bremseth	Moses, Michael G.

10	08/07/2014	Defendant's Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction	Moses, Michael G.
11	10/08/2014	Order Denying Defendant's Rule 12(b)(2) Motion To Dismiss For Lack of Personal Jurisdiction	Moses, Michael G.
12	10/21/2014	FAX COPY: Answer, Affirmative Defenses, and Jury Demand (Original filed 10/27/14)	Moses, Michael G.

13	10/21/2014	FAX COPY: Defendant's Combined Rule 54(b) Motion to Certify this Court's Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction as a Final Judgment and Brief in Support (Original filed 10/27/14)	Moses, Michael G.
		* * *	
15	10/28/2014	Order Clarifying this Court's Order Denying Defendant's Rule 12(b)2 Motion	Moses, Michael G.
		* * *	
17	11/18/2014	Order Granting Defendant's Rule 54(b) Motion to Certify This Court's Order Denying Defendant's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction as a Final Judgment	Moses, Michael G.

18	11/18/2014	FAX COPY: Brief in Opposition to Defendant's Motion to Certify Order Denying Defendant's Rule 12 Motion to Dismiss	Moses, Michael G.
19	12/01/2014	Defendant's Rule 7(d) Notice of Entry of Order Granting Defendant's Rule 54(b) Motion to Certify this Court's Order Denying Defendant's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction as a Final Judgment	Moses, Michael G.
20	12/31/2014	Notice of Appeal	Moses, Michael G.
		* * *	
22	06/21/2016	Supreme Court Opinion	Moses, Michael G.
23	06/21/2016	Supreme Court Remitittur (Affirmed in Part, Reversed in Part, and Remanded)	Moses, Michael G.

CLERK OF THE DISTRICT COURT
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BY _____
DEPUTY

* * *

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

****

ROBERT M. NELSON, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	***Cause No.*** DV-11-0417 ***Judge*** G. TODD BAUGH **COMPLAINT AND JURY DEMAND**

****

COMES NOW the Plaintiff, Robert M. Nelson, by and through counsel and for his cause of action against the Defendant, BNSF Railway Company (BNSF), alleges as follows:

1. This is an action arising under the Federal Employers Liability Act, 45 U.S.C. Section 51, et seq., to recover damages for personal injuries sustained by

Plaintiff while employed by Defendant and while engaged in interstate commerce.

2. Defendant BNSF Railway Company is, and at all relevant times herein was, a Delaware corporation which operates a railroad system as a common carrier of freight in interstate commerce, and operated said railroad in interstate commerce in the State of Montana.

3. Plaintiff is, and at all relevant times herein was, was a citizen of the state of North Dakota.

4. Plaintiff was employed by the Defendant as a fuel truck driver. At all times material hereto, Plaintiff's employment with Defendant was in furtherance of and in connection with interstate commerce, and by reason thereof the rights and liabilities of the parties were and are governed by the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq* (FELA).

5. On or about March 18, 2008, while working within the course and scope of his employment with Defendant, and in the furtherance of interstate commerce, Plaintiff sustained disabling injuries to his right knee.

6. The above described injuries were approximately caused by negligence of the Defendants and its employees. Such negligence includes, but is not limited to:

a. Failure of Defendant to provide Plaintiff with a safe place to work;

b. Failure of Defendant to provide Plaintiff adequate and efficient equipment, machinery, and tools to satisfactorily perform the duties of his employment;

c. Failure of Defendant to provide Plaintiff with adequate personnel to safely perform the duties of this employment;

d. Failure of Defendant to observe to its safety and general rules.

7. Prior to his injuries, Plaintiff was a strong, able-bodied man capable of performing the full range of duties associated with his employment. As a direct and proximate result of Defendant's negligence, Plaintiff has lost wages and has suffered a loss of earning capacity.

8. As a further direct and proximate result of Defendant's negligence, Plaintiff has experienced pain and suffering, has incurred medical expenses and has suffered a loss of ability to pursue an established course of life. Plaintiff will continue to incur such damages and experience pain and suffering and other general damages in the future.

WHEREFORE, Plaintiff, Robert M. Nelson, demands judgment against Defendant in an amount to fully compensate him for all recoverable damages, together with costs and disbursements incurred herein, and for such other and further relief as the Court deems just and proper.

Plaintiff demands a trial by jury.

DATED this 8th day of March, 2011.

/s/
CHRIS R. YOUNG

EXHIBIT A TO BNSF'S MOTION TO DISMISS NELSON'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION

BNSF RAILWAY

EMPLOYEE PERSONAL INJURY/OCCUPATIONAL ILLNESS REPORT

Each employee reporting an injury, condition or occupational illness on duty and/or on property must fill out this report and provide it to his or her supervisor (pursuant to § 225.19). A copy will be provided upon request.

NAME OF REPORTING PERSON	AGE	DATE OF BIRTH	SOCIAL SECURITY NUMBER	EMPLOYEE ID NUMBER
Robert M. Nelson	*47*	*[REDACTED]*	*6-29-98*	*1356964*

ADDRESS OF REPORTING PERSON (STREET, CITY, ZIP CODE)			TELEPHONE NUMBER
[REDACTED]	*Valley City,*	*ND 58072*	*[REDACTED]*

JOB TITLE OF EMPLOYEE (CITY AND STATE)	UNIT POST (IF APPLICABLE)	SUBDIVISION (IF APPLICABLE)	DATE OF INJURY	TIME
Centennial, WA	*32*	*Seattle*	*3-18-08*	*5:30* ☒ AM ☐ PM

HOURS WORKED	WEATHER (check correct response)		WAS TRACK (Check correct response)	
40	☐ RAIN ☐ SNOW ☒ FAIR ☐ SLEET			☐ CLEAR ☒ RAIN ☐ SLEET ☒ FOG ☐ SNOW ☐ ICE

IF THIS IS A CUMULATIVE OCCUPATIONAL ILLNESS OR INJURY, WHEN DID YOU FIRST NOTICE SYMPTOMS? | WHEN WERE YOU FIRST TREATED FOR THIS CONDITION?

DESCRIBE FULLY HOW INJURY OR ILLNESS occurred (attach additional pages if necessary)

Right knee popped Clicks when walking

DESCRIBE DUTY YOU WERE PERFORMING AT THE TIME OF INJURY OR ILLNESS (attach additional pages if necessary)

Fueling cranes the crane Bullcat [sic] rolled out from under foot

WAS THE ACCIDENT CAUSED BY THE CONDITION OF EQUIPMENT? | IF YES, PLEASE DESCRIBE

☐ YES ☒ NO

COULD ANY EQUIPMENT HAVE PREVENTED YOUR INJURY? | IF YES, HOW?

☐ YES ☒ NO

WAS THERE ANY PERSONAL VIOLATION OF RULES, INSTRUCTIONS OR WORK PROCEDURES? | IF YES, PLEASE DESCRIBE

☐ YES ☒ NO

TYPE OF MEDICAL ATTENTION RECEIVED (PRESCRIPTION, HOME, SURGERY, ETC.)

GIVEN BY (HOSPITAL, ETC.) | ADDRESS

NAME OF ATTENDING PHYSICIAN | ADDRESS

SUPERVISOR'S NAME	NOTE – If you do not receive medical treatment as the result of this injury or occupational illness, you must promptly notify your supervisor.
RDO/ Jack Rippllinger	• If you experience any complications resulting from your injury/illness • If you are unable to perform your normal duties or absent yourself from your regular assignment because of this injury/illness • Before visiting a health care professional for subsequent treatment or consultation due to your injury

Tie Crane - 06000275

INDICATE IF THERE ARE ANY WITNESSES TO THIS INJURY OR ILLNESS AND GIVE THEIR NAMES AND ADDRESSES

NAME	ADDRESS	TELEPHONE NUMBER (Home and Cell)

Signed | Date

5-19-08

PLEASE ANSWER ALL QUESTIONS TO THE BEST OF YOUR ABILITY.

[Original document available in handwritten and unredacted form in the state court record]

CLERK OF THE DISTRICT COURT
KRISTIE LEE BOELTER
2014 MAY 16 PM 2 14
FILED
BY __ __
DEPUTY

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRRELL (deceased),	Case No. DV 14-0699
Plaintiff,	Judge INGRID GUSTAFSON
v.	
BNSF RAILWAY COMPANY, a Delaware corporation,	**COMPLAINT AND JURY DEMAND**
Defendant.	

COMES NOW Plaintiff Kelli Tyrrell, as Special Administrator for the Estate of Brent T. Tyrrell (deceased), by through her attorneys, for her Complaint against Defendant BNSF Railway Company states and alleges as follows:

I.

The jurisdiction of this Court is founded upon Title 45, Sections, 1-60 of the United States Code, the Federal Employers' Liability Act of the United States, commonly known and referred to as the "FELA." The proper venue for this case is Yellowstone County, pursuant to MCA 25-2- 122(2)(c).

II.

Kelli Tyrrell was appointed as Personal Representative for the Estate of Brent T. Tyrrell by Minnehaha County, South Dakota, 2nd Judicial Circuit Court on December 18, 2012.

III.

At all times material hereto, Defendant BNSF Railway Company, hereinafter referred to as Defendant, has been a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and as such has been engaged in the business of owing [*sic*], maintaining and operating a line and system of railroad which extended in part through the State of Montana.

IV.

At all times material hereto, Defendant has been a common carrier engaged in interstate transportation and commerce and the Decedent, Brent T. Tyrell, at the time of his injuries, was employed by Defendant as its servant and employee and working in interstate transportation and commerce.

V.

That over the course of his career with the BNSF, and while working within the scope of his employment with Defendant, Decedent was exposed to various carcinogenic chemicals including but not limited to, diesel fuel products and diesel fuel combustion, polycyclic aromatic, hydrocarbons, solvents, benzene, creosote, asbestos, silica, oils, brake cleaner, industrial degreasing chemicals, perchloroethylene, trichloroethylene, herbicides, chlorinated solvents, and other industrial and railroad related chemicals harmful to his health,

which caused him severe suffering and premature death.

VI.

Defendant, its agents, officers and employees were negligent and careless, and that this conduct violated the Federal Employers' Liability Act, the Locomotive Inspection Act, Federal Railroad Administration Regulations, and other safety statutes and regulations enacted pursuant to law as for the protection of railroad employees, and that said actions were responsible for Decedent's injuries and death.

VII.

That Decedent developed Renal Cell Carcinoma as a direct result of Defendant's negligence.

VIII.

That Decedent died on September 11, 2011 as a direct result of the kidney cancer caused, in whole or in part, from said occupational exposure. Thereafter, his Widow, Kelli Tyrrell was appointed as personal representative. As such, Plaintiff, Kelli Tyrrell brings this action individually and on behalf of the heirs of Decedent.

IX.

That as a result of Defendant's conduct, the heirs of Brent T. Tyrrell have suffered economic and non-economic damages, for which the personal representative is seeking recovery.

WHEREFORE, Plaintiff Kelli Tyrrell as special administrator of the estate of Decedent, Brent T. Tyrrell prays for judgment against Defendant BNSF Railway Company in an amount according to proof, together with his costs and disbursements incurred

herein, interest on any judgment entered as allowed by law, and such other and further relief as the Court deems just.

PLAINTIFF DEMANDS TRIAL BY JURY.

Dated: 4/16/14

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

ROBERT M. NELSON,	Cause No. DV 11-0417
Plaintiff,	Judge G. TODD BAUGH
v.	
BNSF RAILWAY COMPANY, a Delaware corporation,	**AFFIDAVIT OF JAMES OBERMILLER**
Defendant.	

I, James Obermiller, of lawful age and, upon his oath deposes and says:

1. I am employed as a Director - Corporate Support and Compliance for BNSF Railway Company. I make this affidavit in support of BNSF's Motion to Dismiss for Lack of Personal Jurisdiction.

2. I began my employment with Burlington Northern Railroad Company, now known as BNSF Railway Company, ("BNSF"), in 1993 and since 2006 I have held the position of Director - Corporate Support and Compliance. In that capacity, I serve as the custodian of records of BNSF Railway Company and am responsible for Records Management for BNSF.

3. This affidavit is based on my personal knowledge as well as my review of business records and documents of BNSF to which I have access or with which I am independently familiar.

4. The statements contained herein are based upon BNSF operations in 2013. To the best of my knowledge, BNSF's operations remain consistent

with the 2013 summaries and statistics provided herein.

BNSF IS "AT HOME" IN TEXAS

5. BNSF provides freight transportation on an interstate rail system.

6. BNSF's principal place of business is Fort Worth, Texas. BNSF is organized under the laws of Delaware.

7. BNSF's corporate headquarters are located in Fort Worth, Texas.

8. BNSF's corporate officers are located in Texas.

9. BNSF's principal officers all maintain their offices in Fort Worth, Texas, including BNSF's:

a. Executive Chairman;

b. President and Chief Executive Officer;

e. Executive Vice President and Chief Marketing Officer;

d. Executive Vice President, Operations;

e. Executive Vice President, Law and Corporate Affairs; and

f. Executive Vice President and Chief Financial Officer.

10. BNSF has a central Network Operations Center in Texas, which provides train dispatching and network operations monitoring.

11. BNSF's various department headquarters that manage the company are all located in Fort Worth, Texas, including:

a. BNSF's Human Resources Department.

b. BNSF's Marketing Department.

c. BNSF's Law Department.

d. BNSF's Engineering Department.

e. BNSF's Finance Department.

f. BNSF's Labor Relations Department.

g. BNSF's Corporate Relations Department.

h. BNSF's Mechanical Department; and

i. BNSF's Claims Department.

12. BNSF's total rail system consists of 32,500 miles of rail trackage in 28 U.S. states and 2 Canadian Provinces.

13. Out of its operations nationwide, BNSF generates the most revenues from its business in Texas.

14. BNSF has more rail trackage in the State of Texas than any other state in the BNSF rail system.

15. BNSF's highest concentration of employees is in the State of Texas. BNSF employs 43,000 people system-wide in 28 U.S. States and 2 Canadian Provinces. Of those 43,000 employees, 8,472 employees — or approximately 20% of BNSF's total workforce — are employed in the State of Texas.

16. BNSF owns and operates 24 Automotive Facilities in 16 different states, with 4 of these facilities — or approximately 17% — being located in the State of Texas.

17. BNSF owns and operates 28 Intermodal Facilities in 16 different states, with 3 of these facilities — or approximately 11% — being located in the State of Texas.

18. BNSF owns and operates 8 Port Facilities in 4 U.S. States and 1 Canadian Province.

19. BNSF considers itself a corporate resident of the State of Texas, conducts its business operations accordingly, and holds itself out as having its headquarters in Fort Worth, Texas.

BNSF'S CONTACTS WITH MONTANA COMPARED TO BNSF OPERATIONS NATIONWIDE

20. BNSF's rail trackage in the State of Montana totals 2,061 miles, or 6% of its total rail system.

21. Only 1 of BNSF's Automotive Facilities, or 4% of the total number of such facilities, is located in the State of Montana.

22. There are 4 other states that have 2 or more BNSF Automotive Facilities, including Washington, California, Minnesota, and Texas.

23. None of BNSF's 28 Intermodal Facilities is located in the State of Montana.

24. None of BNSF's 8 Port Facilities is located in the State of Montana.

25. BNSF employs 2,112 people in the State of Montana, which is less than 5% of BNSF's total workforce. BNSF employs approximately four times as many people in Texas than it does in Montana.

26. None of BNSF's principal corporate officers described in paragraph 12 above have ever maintained offices in the State of Montana.

27. None of BNSF's Department headquarters, responsible for managing the company, have ever been located in the State of Montana.

28. No BNSF central train dispatching or network operations monitoring facilities have ever been located in the State of Montana.

29. BNSF has never been incorporated under the laws of the State of Montana.

30. Montana revenue constitutes less than 10% of BNSF's total revenue.

I declare under penalty of perjury and under the laws of the State of Montana that the foregoing is true and correct.

05/15/2014 Ft. Worth, TX /s/ _____

Date and Place James Obermiller

AFFIDAVIT OF BRUCE G. GLOVER

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

I, Bruce G. Glover, hereby state under oath as follows:

1) My name is Bruce G. Glover. I am the current elected General Chairman of the Brotherhood of Maintenance of Way Employes, (BMWED) Burlington Northern System Federation. My primary area of representation responsibility is the BNSF northern corridor. I also have responsibility for the representation of Maintenance of Way track workers, bridge and building workers and machine operators employed by Montana Rail Link. I have been a member of BMWED since 1974 and have been General Chairman since 1988. Prior to my election as an Officer of BMWED I was employed by BNSF in its Bridge and Building Department with a seniority date of September 16, 1974.

2) As General Chairman, I have many responsibilities with much of my work time dedicated to contract administration to ensure that BNSF adheres to its contractual obligations under its Labor Agreements. But, there is no more important aspect of my responsibilities than to insist and require BNSF provide BMWED Members, including these plaintiffs, with a safe place to work in every respect. I am personally involved in many aspects of BNSF safety programs which include examination of the work place,

equipment, conditions, activities, practices and management of the work place by BNSF. I coordinate these many responsibilities with my counterpart colleagues who represent BNSF BMWED Members specifically including General Chairwoman Stacy Moody-Gilbert on the Central Corridor and General Chairman Gary Marquart on the Southern Corridor. Our work is intermingled because of the need for uniformity across the BNSF system in both contract administration and issues related to safe· places to work. Railroad companies like BNSF operate in many states and decisions and actions taken in one state affects the work practices and safety in other states. This is also true of decision and actions taking place in the State of Montana.

In addition to my work under the Railway Labor Act, I also interact frequently with the application and use of FELA and its practitioners as an important and vital accountability mechanism to enhance the safety of the work place. Montana courts and BMWED Members access to them has been a vital and indispensable factor in ensuring that BNSF track workers and other employees have as safe workplace as possible.

3) As General Chairman, of the Burlington Northern System Federation I represent Maintenance of Way Members employed by BNSF across many states including, but not limited to: Minnesota, Wisconsin, Iowa, South Dakota, North Dakota, Montana (both north and south lines), Idaho, Washington, Oregon and California. In addition, I and my colleagues on the two other BNSF rail corridors act jointly in many issues within and without Montana because decisions

and actions taken in Montana have a direct bearing on decisions and actions taken by BNSF in other states.

4) I am very familiar with the work practices and conditions of employment associated with Maintenance of Way employees employed by BNSF both within my elective territory and also across the entire BNSF property.

5) Most BMWED members do not have a traditional "work place" as that term is used in other employment settings. BMWED Member's work place very often consists of the entire BNSF rail system. Unlike other sectors of the economy, Maintenance of Way Craft employment by railroad companies like BNSF is not limited by geographical areas or regions, state lines, or a specific localities or places of residence. As example, in 2014 approximately 50 large "production gangs" (like mobile assemble lines) are assigned work schedules that include work in multiple states, some will work around the entire rail system. Several of these gangs will work in Montana. BMWED Members who staff these Gangs will be solicited from all across the entire BNSF rail system. Many BMWED Members from Montana will be required to work across the entire BNSF rail system and many BMWED Members from all around the rail system will work over their career in many states, including the state of Montana. This work is highly transitory.

6) The same is true of the equipment and track machinery utilized in the work activities of BMWED Members, including these plaintiffs. This equipment

frequently is operated in, originates in or is maintained or repaired within one state such as Montana for use in other states across the system. To the extent that these activities are negligently performed, that negligence would occur in part in Montana.

7) Accordingly, although BMWED Members may be a resident of one state, they could be injured either traumatically or over a long period of time in many other states. Similarly, a resident of Montana could be injured traumatically or cumulatively in other states. Likewise, a resident of another state could easily suffer injuries and other occupational injuries in whole or in part within Montana or as a result of decisions and actions taken in Montana. Like the workplace, the injuries and importantly the occupational conditions and diseases of BMWED Members are frequently not defined by specific times and places but rather occur across his entire career in many states.

8) Thus, the workplace for a BNSF Maintenance of Way worker is in fact the 28 states within which the BNSF does business across the United States. Because of Montana's location within the BNSF system, the state of Montana is a central and important part of the BNSF system and is heavily involved in transportation from the east to the west and from the north to the south. BNSF is also a central, important and critical transportation company within Montana's economy and it reaps significant economic benefits from operating within the State of Montana.

9) Accordingly because of the central role which the Montana division of the BMWED plays in the

overall life of a BNSF track worker, BMWED Members including the Members of my colleagues across the United States have a compelling interest in ensuring that the State of Montana establish the highest and safest standards of practice in providing a safe work place for BMWED Members and further that BMWED Members be afforded their long term, historical access to the courts of Montana in the event of work-related injuries, diseases or conditions.

Indeed, in my years of experience, access by BMWED Members to Montana courts have played an indispensable role in helping ensure that BNSF provides BMWED Members, and all other BNSF employees, together with citizens of the State of Montana with the safest workplaces possible and that access has also inured to the benefit of the State of Montana which also has a critical interest in ensuring that the decisions and actions taken by BNSF within and without Montana, remain consistent with Montana's compelling interest in ensuring that BNSF operate safely

The denial of access to the courts of Montana would ignore the inter-connectedness and national character of BNSF operations which affect the interests of BMWED Members and the State of Montana which can result in a less safe workplace and less safe railroad operations within Montana and across the country.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 30 day of May, 2014.

/s/ _____
Bruce G. Glover

Subscribed and sworn to before me

this *30th* day of *May*, 2014. [S E A L]

/s/ _____
Notary Public
My Commission Expires: *1/31/19*

SECRETARY OF STATE

STATE OF MONTANA

CERTIFICATE OF AUTHORIZATION

I, Linda McCulloch, Secretary of State of the State of Montana, do hereby certify that on 4 March 1970, this office issued a Certificate of Authority to:

BNSF RAILWAY COMPANY

a foreign corporation organized under the laws of the State or the Province of Delaware, to transact business and conduct affairs in the State of Montana.

I further certify that all fees reflected in the records of the Secretary of State have been paid and that the most recent annual report has been filed with this office.

I further certify that the Certificate of Authority of said corporation has not been revoked and it has not been issued a certificate of withdrawal nor has it caused any notice of dissolution or withdrawal to be placed on record in this office.

I further certify that my records indicate the corporation is in good standing under the laws of the State of Montana and is authorized to conduct its business and affairs in this State.

The Secretary of State cannot certify that tax and penalties owed to this state on record with the Department of Revenue are current. Please contact the Department of Revenue at (406) 444-6900 to obtain information on tax status.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this 30 May 2014.

/s/

LINDA MCCULLOCH
Secretary of State

Certified File Number: F007907

BNSF Railway Company
Leased Lines and Wholly-Owned Subsidiaries

Class 1 Railroad Annual Report
To the Montana Public Service Commission
for the Year Ending December 31, 2013

BNSF Railway Company
State Statistics

Notice

The state statistics hereinafter contained are filed pursuant to the direction of the regulatory authorities of the State of Montana. To the extent that such statistics contain allocations to the state, which are in part the result of arbitrary separations or proration, BNSF Railway Company and Burlington Northern Santa Fe LLC do not accept such allocations as reflecting actual operating results for the aforementioned state, and reserve the right to challenge such results in any proceeding in which they may be utilized.

* * * * *

Road Initials: BNSF Year 2013 Montana SC-7

SC-210, RAILWAY OPERATING REVENUES EARNED WITHIN THE STATE
(Dollars in Thousands)

Code	Description	On Intrastate Traffic	On Interstate Traffic	Total
101	Freight	5,829	1,723,600	1,729,429
102	Passenger			
104	Switching	77	88	165
106	Demurrage	13	3,902	3,915
110	Incidental	1,623	13,919	15,542
121	Joint Facility – Credit	1	257	258
122	Joint Facility – Debit			
502	Transfers from Govt Authorities			
	Total Railway Operating Revenues	7,543	1,741,766	1,749,309

* * * * *

SC-700. MILEAGE OPERATED AT CLOSE OF YEAR – WITHIN THE STATE

				Running Tracks, Passing Tracks, Cross-Overs, Etc.						
Line No.	Class (a)	Proportion owned or leased by Respondent (b)	Main (M) or branch (B) line (c)	Miles of road (d)	Miles of second main track (e)	Miles of all other main tracks (f)	Miles of passing tracks, cross-overs, turnouts (g)	Miles of way switching tracks (h)	Miles of yard switching tracks (i)	Total (j)
1	1	100	M	1,515	123		230	116	73	2,057
2	1	100	B	546			18	23	37	624
3	1	TOTAL	M&B	2,061	123		248	139	110	2,681
4										
5	5		M	17				12		29
6	5		B	34				4		38
7	5	TOTAL	M&B	51				16		67
						* * * * *				
43		Total Main Line		1,532	123		230	128	73	2,086
44		Total Branch Line		580			18	27	37	662
45		Grand Total		2,112	123		248	155	110	2,748
46		Miles of electrified road or track included in preceeding grand total		None						

* * * * *

Road Initials: BNSF Year 2013 Montana
SC-18

SC-931. STATISTICS OF RAIL-LINE OPERATIONS – WITHIN THE STATE				
Line No.	Item (a)	Freight Trains (b)	Passenger Trains (c)	Total Transportation service (d)
1	Average mileage of road operated	2,112		2,112
2	Train-Miles Diesel locomotives	13,389,347		13,389,347
3	Other locomotives			
4	Total locomotives	13,389,347		13,389,347
5	Motorcars			
6	Total train-miles	13,389,347		13,389,347
7	Locomotive Unit-Miles Road service	39,679,599		39,679,599
8	Train switching	754,834		754,834
9	Yard switching	205,162		205,162
10	Total locomotive unit-miles	40,639,595		40,639,595
11	Car-Miles (Thousands) Total motorcar car-miles			
12	Loaded time-mileage freight cars	403,662		403,662
13	Loaded other freight cars			
14	Empty time-mileage freight cars	308,827		308,827
15	Empty other freight cars			
16	Caboose	1		1
17	Total Freight car-miles (lines 12, 13, 14, 15 and 16)	712,490		712,490
18	Passenger coaches			
19	Combination pass cars (mail, express, baggage, etc.)			
20	Sleeping and parlor cars			
21	Dining grill and tavern cars			
22	Head-end cars			
23	Total (lines 18, 19, 20, 21, and 22)			
24	Business cars			
25	Crew cars (other than caboose)			
26	Grand total car miles (lines 11, 17, 23, 24 and 26)	712,490		712,490

	Gross Ton-Miles and Train-Hours in Road Service			
27	Gross ton-miles of locomotives and tenders (thousands)	8,110,048		8,110,048
28	Gross ton-miles frt cars, contents and cabs (thousands)	66,502,224		66,502,224
29	Gross ton-miles passenger cars and contents (thousands)			
30	Train-hours-Total	810.549		810.549
	Revenue and Nonrevenue Freight Traffic			
31	Tons of revenue freight	XX XX XX XX XX XX	XX XX XX XX XX XX	34,784
32	Tons of nonrevenue freight	XX XX XX XX XX XX	XX XX XX XX XX XX	716
33	Total tons revenue and nonrevenue freight	XX XX XX XX XX XX	XX XX XX XX XX XX	35,499
34	Ton-miles-Revenue freight in road service (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	38,808,703
35	Ton-miles-Revenue frt in lake transfer serv (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	
36	Total ton-miles-Revenue freight (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	38,808,703
37	Ton-miles-Nonrevenue frt in road serv (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	362,360
38	Ton-miles-Nonrevenue frt lake transfer serv (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	
39	Total ton-miles Nonrevenue freight (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	352,360
40	Net ton-miles frt-Revenue and nonrevenue (thousands)	XX XX XX XX XX XX	XX XX XX XX XX XX	39,161,083
	Revenue Passenger Traffic			
41	Passengers carried-Total	XX XX XX XX XX XX	XX XX XX XX XX XX	
42	Passenger miles-Total	XX XX XX XX XX XX	XX XX XX XX XX XX	
43	Train-Miles Work Trains Locomotives	246,088		246,088
44	Motorcars			
45	Total	246,088		246,088

Road Initials: BNSF Year 2013 Montana
SC-19

SC-931. STATISTICS OF RAIL-LINE OPERATIONS – WITHIN THE STATE-Concluded State hereunder the car-miles of the respondent within the state by privately owned freight cars and included in the items above given

Item No.	Item	Freight Trains	Passenger Trains	Total Transportation service
	(a)	(b)	(c)	(d)
46	Loaded freight cars	215,945,318		
47	Empty freight cars	101,812,023		
48	Sum of loaded and empty	377,757,341		

INSTRUCTIONS CONCERNING SCHEDULE 931

1. Give the various statistical items called for concerning the rail-line operations of the respondent's road during the year. Train-miles, car-miles and other particulars are to be reported in accordance with the classification of train-miles and car-miles prescribed in the Uniform System of Accounts for Railroad Companies (Mileage Accounts 600 to 605 and 620 to 625). Locomotive unit-miles should include all miles made by each locomotive unit.
2. Time-mileage freight cars, as used herein, refers to freight cars other than cabooses owned or held under lease arrangements by U S. class 1 end-haul railroads, whose interline rentals is settled on a per diem and no-haul basis under "Code of Car Hire Rules" or would be so settled if used by another railroad.
3. Line No. 1 includes miles of road operated under trackage rights.
4. All statistics should be reported in whole numbers unless otherwise indicated in thousands. For gross ton-miles compute from conductors' or dispatchers' train reports weight in tons (2,000 pounds). Line 27 includes weight of all locomotives units moved one mile in tranportation trains. Ton-miles of motorcars should be excluded. Lines 28 and 29 represent tons behind locomotive units (cars and containers, company service equipment and caboose) moved one mile in transportation trains, include ton-miles of exclusive work service equipment and motorcars moving in transportation trains. Use 150 pounds as the average weight per passenger and four tons as the average weight of contents of each head-end car.
5. Line No. 36 should represent the ton-miles of revenue freight in water transfer service on the Great Lakes involving a rail-line haul, the revenue from which is includable in account H 101, which was moved on the basis of lawful local tariff rates, the revenue from which is crediable to account No. 113, "Water transfers," should be excluded. Line 38, Total ton-miles-Revenue freight, should correspond to the ton miles reported on Form 08-B, Item 2.
6. For net ton-miles, Line 40, compute from conductors' train reports. This item represents the number of tons of revenue and non-revenue freight moved one mile in transportation trains, include a reasonable proportion of the freight of exclusive work equipment moved one mile, include net ton-miles in motorcar trains. Exclude LCL shipments handled in [illegible] baggage-express cars.
7. The mileage of company service equipment, designed exclusively for work service and moved in transportation trains, should be classed as loaded freight car-miles.
8. Highway vehicle operations should not be included in Schedule 931 but particulars thereof given in a footnote below.

Footnotes and remarks

WD
BEF8

FILED
FEB 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF FOR PETITIONER

ANDREW S. TULUMELLO
Counsel of Record
MICHAEL R. HUSTON
SEAN J. COOKSEY
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atulumello@gibsondunn.com

Counsel for Petitioner BNSF Railway Company

QUESTION PRESENTED

Whether, notwithstanding this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), a state court can exercise personal jurisdiction over a defendant railroad that is not at home in the state, in a case that does not arise in the state, on the ground that the plaintiff pleads a cause of action under the Federal Employers' Liability Act and the railroad is not incorporated overseas.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, Respondent BNSF Railway Company states that its parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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Other Authorities

1 J. Kent,
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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Montana (Pet. App. 1a–33a) is reported at 373 P.3d 1.

JURISDICTION

The Supreme Court of Montana entered its judgment on May 31, 2016, accompanied by an opinion deciding the federal question presented in the petition for a writ of certiorari. The court filed a corrected opinion with non-substantive revisions on June 7, 2016. Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 28, 2016, and the petition was filed on that date.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Montana Supreme Court's "judgment is plainly final on the federal issue" of personal jurisdiction under the Due Process Clause, which "is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Petitioner BNSF Railway Company "may prevail at trial on nonfederal grounds," thereby preventing this Court's review of the federal issue, and if the Montana Supreme Court erroneously found personal jurisdiction, then "there should be no trial at all." *Ibid.* In *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977), this Court held that it has jurisdiction under Section 1257(a) and *Cohn* to review a state court's assertion of personal jurisdiction. This Court also exercised jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), which had a similar posture to one of these cases: a state-court judgment affirming, before trial, the denial of a motion to dismiss for lack of personal jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

***

The relevant portion of the Federal Employers' Liability Act, 45 U.S.C. § 56, provides:

> ...
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

***

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (continued)

The relevant portion of Federal Rule of Civil Procedure 4 provides:

> (k) Territorial Limits of Effective Service.
>
> (1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
>
> ... or
>
> (C) when authorized by a federal statute.
>
> ***

The relevant portion of the Montana long-arm statute, Montana Rule of Civil Procedure 4(a), (b), provides:

> (a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, or organized under the laws of this state, includes:
>
> ...
>
> (3) a corporation;
>
> ...
>
> (b) Jurisdiction of Persons.
>
> (1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts ...
>
> ***

INTRODUCTION

The Montana Supreme Court has flouted this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). This Court in *Daimler* held that, when a plaintiff pleads a cause of action that does not arise in the forum state, the Due Process Clause of the Fourteenth Amendment prohibits a state court from exercising personal jurisdiction unless the defendant is "at home" in the state. *Id.* at 760.

That straightforward constitutional rule resolves these cases. Respondents brought workplace-injury actions against Petitioner BNSF Railway Company in Montana state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51. The cases do not by *any* measure arise in Montana: Respondents are residents of other states (North Dakota and South Dakota) who never worked a day in Montana, were not injured in Montana, and do not allege that BNSF was negligent in Montana. Nor is BNSF at home in Montana under *Daimler*: BNSF is a Delaware corporation whose principal place of business is Texas.

Respondents elected to sue in Montana instead of the states where their cases arose because the Montana Supreme Court has repeatedly subjected railroads to plaintiff-friendly procedural rules and unfavorable substantive FELA standards. Magnet jurisdictions like this one breed cynicism about the civil justice system, and this Court's opinion in *Daimler* aimed to put a stop to this type of flagrant forum shopping. But the Montana Supreme Court has other ideas. Instead of applying *Daimler* and ordering these cases dismissed for lack of personal jurisdiction under the Due Process Clause, the Montana Supreme Court reached the extraordinary conclusions (1) that Congress *conferred* personal jurisdiction on state courts in

FELA Section 56, Pet. App. 13a, and (2) that *Daimler* is "factually ... distinguishable," Pet. App. 15a, in light of its transnational facts—a holding that Respondents do not defend in this Court.

The Montana Supreme Court's judgment must be reversed. FELA does not remotely confer personal jurisdiction on state courts. As this Court has held, Section 56 of FELA specifies *venue* for cases filed in *federal* court, *see Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941), and then confirms that Congress did not deprive state courts of *subject-matter* jurisdiction over FELA claims, *see Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55–56 (1912).

The Montana Supreme Court attempted to buttress its decision by badly misreading some of this Court's older precedents as interpreting FELA to confer personal jurisdiction on state courts. But not one of the cases the Montana majority relied on so much as mentioned personal jurisdiction under the Due Process Clause. This Court has never held that Section 56 of FELA has anything to do with personal jurisdiction in state courts. Moreover, even if Congress had attempted through FELA to supersede the Due Process Clause's limits on state courts' personal jurisdiction, the statute would be unconstitutional because "Congress does not have the power to authorize the individual States to violate the [Fourteenth Amendment]." *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

This Court must correct the Montana Supreme Court's departure from the clear teaching in *Daimler*. While FELA plaintiffs plainly have access to state and federal courts, the statute does not subject railroads to personal jurisdiction in the courts of every state

where they do business. The Montana Supreme Court's decision to the contrary violates FELA's plain text and adopts a view of personal jurisdiction that is "unacceptably grasping." *Daimler*, 134 S. Ct. at 761.

STATEMENT

A. The Federal Employers' Liability Act

1. In 1908, "[i]n response to mounting concern about the number and severity of railroad employees' injuries, Congress ... enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007) (citing *Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 53–55 (1912)). "Unlike a typical workers' compensation scheme, which provides relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence." *Ibid.* The statute makes railroads liable "'in damages to any person suffering injury while he is employed by such carrier ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.'" *Ibid.* (citing 45 U.S.C. § 51).

2. FELA as originally enacted, *see* Act of April 22, 1908, ch. 149, 35 Stat. 65, soon produced two practical problems. First, the original act contained no venue provision, and thus FELA cases in federal court were controlled by the general venue statute. *See Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941); J. C. Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 L. & Contemp. Probs. 367, 368 (1953) (describing the history of FELA). At the time, the general venue statute provided that "no civil suit shall be brought ... against any person ... in any other district than whereof he is an inhabitant," Act of Aug. 13,

1888, ch. 866, § 1, 25 Stat. 433, 434, which for a corporation meant only the place of incorporation. Gibson, *supra*, at 368; *see also* Marvin J. Sloman, *Forum Non Conveniens in FELA Actions Under the Judicial Code of 1948*, 27 Tex. L. Rev. 698, 701 (1949). Congress perceived an "injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their homes." *Kepner*, 314 U.S. at 49–50.

The second problem was that the Supreme Court of Errors of Connecticut interpreted FELA in *Hoxie v. New York, New Haven & Hartford Railroad Co.*, 73 A. 754 (Conn. 1909), to bar state courts from exercising subject-matter jurisdiction over FELA claims. *See Second Employers' Liability Cases*, 223 U.S. at 55; Gibson, *supra*, at 369 & n.13, 371 & n.17. That was wrong: Congress never intended to confer exclusive subject-matter jurisdiction on the federal courts in FELA cases. *See Second Employers' Liability Cases*, 223 U.S. at 56.

3. Congress responded in 1910 by amending FELA:

> ...
>
> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under

> this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Act of April 5, 1910, ch. 143, § 1, 36 Stat. 291. Today, substantially identical text is codified at 45 U.S.C. § 56, except that FELA's anti-removal provision is now separately codified at 28 U.S.C. § 1445(a).

4. Congress's amendment to FELA removed the limitations of the general venue statute and significantly expanded a FELA plaintiff's options for venue in cases in federal court by providing that venue would be proper in any federal district where the railroad was doing business. *See Kepner*, 314 U.S. at 51–54. In the second sentence of Section 56, Congress abrogated *Hoxie* and confirmed that state courts have "concurrent" jurisdiction—that is, subject-matter jurisdiction—to hear FELA claims. *See Second Employers' Liability Cases*, 223 U.S. at 55–56. Congress also prohibited removal to federal court of FELA actions, so long as the case was filed in a state court of competent jurisdiction. *See Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918). The 1910 amendment did not address where defendants could be served with process, and therefore did not alter personal jurisdiction in federal (or state) courts. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–23 (1925) (personal jurisdiction depends on the defendant's amenability to service of process); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (same).

B. Factual Background

1. BNSF is a rail carrier incorporated in Delaware. JA24. BNSF's principal place of business is Texas. *Ibid.* All of BNSF's corporate headquarters and corporate officers are located in Texas. *Ibid.* None of

BNSF's corporate officers or departments has ever been located in Montana. JA26.

BNSF operates 32,500 miles of rail lines in 28 states and 2 Canadian provinces. JA25. BNSF has more track miles in Texas than in any other state. *Ibid.* The company dispatches its trains and monitors its network from its Network Operations Center in Fort Worth, Texas. JA24. BNSF generates more revenue from Texas than from any other state. JA25. Of BNSF's 43,000 employees, the company employs more people in Texas (approximately 20% of its workforce) than in any other state. *Ibid.*

Montana is one of the 28 states in which BNSF operates. BNSF's revenues from Montana represent only a small fraction—less than 10%—of its nationwide business. JA27. Barely 6% of BNSF's total track mileage is located in Montana, and less than 5% of BNSF's total workforce is located in Montana. JA26.

2. Respondents are two plaintiffs from outside Montana who allege that they were injured while working for BNSF outside Montana. They nevertheless brought suits in Montana state court against BNSF under FELA.

Respondent Robert Nelson is a resident of North Dakota who was employed by BNSF as a fuel truck driver. JA16. In March 2008, while working for BNSF in Washington, Mr. Nelson slipped and fell, injuring his knee. JA16, JA18. He does not allege that he is or was a resident of Montana, that he has ever worked for BNSF in Montana, or that his case is in any way connected to Montana. *See* Pet. App. 3a.

Respondent Kelli Tyrrell was appointed personal representative for the estate of Brent T. Tyrrell, a former employee of BNSF, in South Dakota. JA20. Mr.

Tyrrell allegedly worked for BNSF in South Dakota, Minnesota, and Iowa. *See* Pl.'s Opp. to Def.'s Mot. to Dismiss in Yellowstone Cty. Dist. Ct. 3. The complaint alleges that, during Mr. Tyrrell's employment, he was exposed to "various carcinogenic chemicals" that caused him to develop renal cell carcinoma which resulted in his death in 2011. JA20–JA21. The complaint does not allege that any exposures occurred in Montana or that Mr. Tyrrell ever worked or lived in Montana. Pet. App. 3a–4a.

C. Respondents File Suit In Montana, Which Has Friendly Rules And Standards For FELA Plaintiffs

1. Pursuant to Montana's venue statute, Respondents filed these cases in Yellowstone County, Montana, where BNSF has a registered agent to accept service of process. *See* Mont. Code Ann. § 25-2-122(2)(c) (for a tort action that occurred out-of-state brought by an out-of-state plaintiff against a corporation incorporated out-of-state, venue is "the county in which the corporation's resident agent is located").

2. By filing these cases in Montana state court, Respondents sought the benefit of several litigation advantages that they would not enjoy in other state or federal courts: Once a complaint is timely filed within the applicable statute of limitations, Montana gives plaintiffs up to *three additional years* to serve the complaint on the defendant. Mont. R. Civ. P. 4(t)(1). Montana does not require discovery to be proportional to the needs of the case. *Compare* Mont. R. Civ. P. 26(b), *with* Fed. R. Civ. P. 26(b). The Montana Supreme Court refuses to allow motions to transfer FELA cases based on forum non conveniens. *State ex rel. Burlington N. R.R. Co. v. Dist. Court*, 891 P.2d 493, 499 (Mont.

1995). Montana generally does not follow the standards for expert witnesses in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), except for novel scientific testimony. *See McClue v. Safeco Ins. Co. of Ill.*, 354 P.3d 604, 609 (Mont. 2015). And Montana requires only two-thirds of a jury to agree on a verdict. Mont. R. Civ. P. 48.

3. FELA plaintiffs in Montana enjoy additional litigation advantages under substantive law. The Montana Supreme Court has criticized the reasoning of multiple federal circuit courts and interpreted FELA's statutory three-year statute of limitations to allow plaintiffs to recover for the full amount of their injuries so long as, sometime in the past three years, the defendant's alleged negligence contributed in any way (however slight) to the injury. *See Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1260–61 (Mont. 2015), *cert. denied*, 136 S. Ct. 1493 (2016). As a result, not only do railroads face FELA cases in Montana that should be tried elsewhere; railroads face long-stale claims in Montana that should not be tried at all.

Whereas railroad defendants in other courts are entitled to seek have their FELA liability apportioned to account for a plaintiff's preexisting conditions, *see Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1996), the Montana Supreme Court has strongly suggested that railroads cannot make this defense, *see Anderson*, 354 P.3d at 1263–64. The Montana Supreme Court has also held that a violation of a railroad's own internal safety rules will be deemed a violation of federal safety regulations and constitutes negligence per se. *See Woods v. BNSF Ry. Co.*, 104 P.3d 1037, 1039–40 (Mont. 2004).

The Montana Supreme Court also has significantly expanded railroads' potential liability under

state law. Even though this Court has held that Congress intended that FELA would provide the sole method of recovery for injured railroad workers, *see Sorrell*, 549 U.S. at 165, the Montana Supreme Court has approved—and held that FELA does not preempt—novel independent causes of action against railroads for "mismanagement" of an investigation into a worker's injury, *Winslow v. Mont. Rail Link*, 16 P.3d 992, 995–96 (Mont. 2000), and "bad faith" refusal to settle a worker's claim (*i.e.*, offering to settle on terms that are allegedly "unreasonably" low), *Reidelbach v. BNSF Ry. Co.*, 60 P.3d 418, 421–22, 430 (Mont. 2002).

4. The Montana Supreme Court has repeatedly and consistently ruled against railroad defendants in FELA cases. In five recent cases where railroads obtained a defense jury verdict at trial, the Montana Supreme Court reversed every one. *See Anderson*, 354 P.3d 1248; *Martin v. BNSF Ry. Co.*, 352 P.3d 598 (Mont. 2015); *Spotted Horse v. BNSF Ry. Co.*, 350 P.3d 52 (Mont. 2015); *Boude v. Union Pac. R.R. Co.*, 277 P.3d 1221 (Mont. 2012); *Weber v. BNSF Ry. Co.*, 261 P.3d 984 (Mont. 2011). In several other cases, the Montana Supreme Court has reversed lower court decisions dismissing cases or granting summary judgment in favor of railroad defendants. *See Cook v. Soo Line R.R. Co.*, 198 P.3d 310 (Mont. 2008); *Dovey v. BNSF Ry. Co.*, 195 P.3d 1223 (Mont. 2008); *Reidelbach*, 60 P.3d 418. Meanwhile the Montana Supreme Court affirmed rulings in favor of FELA plaintiffs and affirmed or increased FELA plaintiff's verdicts. *See Cheff v. BNSF Ry. Co.*, 243 P.3d 1115 (Mont. 2010); *Bircher v. BNSF Ry. Co.*, 233 P.3d 357 (Mont. 2010) (affirming district court's grant of a new trial after a jury verdict in favor of railroad defendant); *Woods*, 104 P.3d 1037 (overturning jury's finding that the plaintiff

was 50% negligent and reinstating the plaintiff's entire award).

Given this extraordinary combination of plaintiff-friendly procedural rules, legal standards, and case outcomes, it is unsurprising that BNSF has recently faced 36 FELA lawsuits in Montana state court that have no connection whatsoever to Montana.[1]

D. The Montana Supreme Court Holds That *Daimler* Does Not Apply To These Cases

1. BNSF moved separately to dismiss Respondents' cases based on *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), arguing that the Due Process Clause prevents Montana state courts from exercising personal jurisdiction because these cases do not arise in Montana and BNSF is not at home in Montana. The trial court in *Tyrrell* denied BNSF's motion to dismiss, Pet. App. 47a–73a, but it granted BNSF's motion to certify its ruling as final so that BNSF could appeal, Pet. App. 41a–46a. Meanwhile, the trial court in *Nelson* granted BNSF's motion to dismiss for lack of personal jurisdiction, Pet. App. 36a–40a, and the plaintiff appealed as of right. The Montana Supreme Court then accepted BNSF's appeal in *Tyrrell*, Pet. App. 34a–35a, and consolidated the cases.

2. A divided Montana Supreme Court held that 45 U.S.C. § 56 entitles out-of-state plaintiffs to sue BNSF in Montana on FELA claims arising anywhere on

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[1] BNSF's petition for a writ of certiorari (at 25) and reply in support (at 11) identified 33 out-of-state FELA cases in Montana in addition to *Tyrrell* and *Nelson*. Since then, another new case has been served on BNSF in Montana. *Silva v. BNSF Ry. Co.*, No. DV 15-0838. Some cases have been settled or dismissed. BNSF faces similar forum-shopping in Madison County, Illinois, *see* Pet. Reply 11, and in other states.

BNSF's nationwide rail system, that exercising personal jurisdiction over an out-of-state railroad on out-of-state claims does not violate the Due Process Clause, and that *Daimler* does not apply because that case involved transnational facts. Pet. App. 5a–15a.

The Montana Supreme Court first noted that Section 56 was enacted to expand venue for FELA cases, which prior to Section 56 was limited by statute to the "'district of which the defendant was an inhabitant.'" Pet. App. 6a (quoting *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941)). The court stated that the purpose of the amendment was to give an injured plaintiff an expansive choice of venue for bringing a FELA action, and moreover to "permit[] suits in state courts[.]" Pet. App. 6a–7a (quoting *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 702 (1942)).

The Montana Supreme Court stated that because Section 56 of FELA "does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction," and because "the U.S. Supreme Court has never given it such an interpretation," it is "not the province of this Court to insert such a limitation." Pet. App. 14a. The majority thought that reading FELA to confer personal jurisdiction on state courts "is in line with the U.S. Supreme Court's 'liberal construction' of the FELA in favor of injured railroad workers." Pet. App. 14a (quoting *Urie v. Thompson*, 337 U.S. 163, 180 (1949)).

The Montana Supreme Court also stated that *this Court* "consistently has interpreted 45 U.S.C. § 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the

railroad doing business in the forum state." Pet. App. 8a. The Montana majority quoted this Court's decision in *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 383 (1953), for the proposition that Section 56 "provides that the employee may bring his suit wherever the carrier 'shall be doing business[.]'" Pet. App. 8a; *see also* Pet. App. 8a–9a (quoting *Miles*, 315 U.S. at 702); Pet. App. 12a–13a (quoting *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286 (1932)). The Montana Supreme Court did not say whether any of these cases involved personal jurisdiction under the Due Process Clause.

As to *Daimler*, the Montana majority concluded that the case does not control here because *Daimler* "addressed 'the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.'" Pet. App. 11a (quoting *Daimler*, 134 S. Ct. at 750). The Montana Supreme Court characterized *Daimler* as "factually ... distinguishable," Pet. App. 15a, because *Daimler* "did not involve a FELA claim or a railroad defendant," Pet. App. 11a.

The Montana Supreme Court also stated that it would be unjust if, in the case of a Montana resident who sustained an injury out of state, the plaintiff were unable to sue in Montana courts. Pet. App. 14a. The Montana Supreme Court considered this outcome contrary to FELA's purpose to avoid requiring injured workers to sue in the defendant's place of incorporation. Pet. App. 14a (citing *Kepner*, 314 U.S. at 49–50). Therefore, the Montana Supreme Court reasoned, "if Montana residents may sue BNSF in a Montana state court for injuries that occur outside of Montana, so

may residents of other states," because hearing FELA claims of Montana residents while refusing to hear claims of non-residents would violate the Privileges and Immunities Clause of article IV, section 2. Pet. App. 14a (citing *Miles*, 315 U.S. at 704).

In a separate portion of the opinion, the Montana Supreme Court held that BNSF is subject to general personal jurisdiction in Montana under *state* law. Pet. App. 15a–19a. The Montana Supreme Court has interpreted Montana Rule of Civil Procedure 4(b)(1) to mean that any defendant "that maintains 'substantial' or 'continuous and systematic' contacts with Montana" is "found within" Montana and subject to personal jurisdiction "even if the cause of action is unrelated to the defendant's activities within Montana." Pet. App. 16a (quoting *Tackett v. Duncan*, 334 P.3d 920, 925 (Mont. 2014)).

2. Justice McKinnon dissented. Pet. App. 20a–33a. She criticized the majority for "[d]isregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler* ... in favor of substantially the same formulation"—a doing-business test—"that the Supreme Court rejected." Pet. App. 20a. Justice McKinnon found "no authority for the proposition that the quality or quantity of process afforded a defendant by the requirement of general jurisdiction depends on the type of cause of action pursued by the plaintiff or the occupation of the defendant." Pet. App. 26a.

Justice McKinnon found it "[r]emarkabl[e]" that the majority "arrive[d] at [its] conclusion *without citing a single* general jurisdiction case." Pet. App. 27a.

The FELA precedents from this Court cited by the majority "hav[e] nothing to do with general jurisdiction under the Due Process Clause," those cases "do not so much as mention the Due Process Clause or general jurisdiction," and they have never been cited by this Court "for any proposition remotely related to general jurisdiction." Pet. App. 27a–28a. Thus, the majority's "claimed 'century' of United States Supreme Court precedent permitting general jurisdiction wherever a nonresident railroad is doing business simply does not exist." Pet. App. 28a.

Justice McKinnon argued further that the majority's interpretation of FELA is deeply flawed because this Court has held that "Section 56 is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts." Pet. App. 29a. Moreover, "[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet App. 30a. In any event, she concluded, "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." Pet. App. 31a.

SUMMARY OF ARGUMENT

I. The Due Process Clause prohibits Montana state courts from exercising personal jurisdiction over BNSF in these cases.

A. This Court has held that when a case does not arise in the forum state, a state court may not exercise personal jurisdiction unless the defendant is at home in the forum. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). In *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), this Court held

that a corporate defendant is at home only where it is incorporated or has its principal place of business, save an exceptional case where a corporation has created a surrogate principal place of business somewhere else.

Those simple jurisdictional rules resolve these cases. The cases do not arise in Montana. BNSF is not at home in Montana. This is not an exceptional case.

B. The Montana Supreme Court's distinctions of *Daimler* are wrong. The constitutional protections of due process do not change based on the cause of action asserted or the nature of the defendant's business. Nor was this Court's holding in *Daimler* confined to transnational fact patterns. The Montana Supreme Court also misunderstood the Privileges and Immunities Clause, which is not implicated when state courts decline to exercise personal jurisdiction in order to comply with the Due Process Clause.

The Montana Supreme Court believed it was necessary to create special rules of personal jurisdiction so that injured workers would not be forced to travel to a railroad's state of incorporation to bring suit. That was error. Under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), these cases can be brought *wherever* they arise (or, at Respondents' option, in BNSF's place of incorporation or principal place of business). But these cases cannot be brought in Montana, which has no connection to the litigation.

II. The Federal Employers' Liability Act does not confer personal jurisdiction on state courts.

A. The text of the statute does not support the Montana Supreme Court's interpretation.

1. The first sentence of Section 56 explicitly refers to where cases may be brought "in a district court of the United States." This Court and others have consistently interpreted that sentence to refer only to cases in federal court. *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941). Moreover, the statute affects only venue, *see ibid.*, not personal jurisdiction, which in federal courts is controlled by where a defendant is amenable to service of process, *see Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104–05 (1987). Nothing in Section 56 addresses service of process.

The history of Section 56 similarly confirms that Congress intended to provide an expansive choice of *venue*, because the general federal venue statute at the time limited venue in cases against corporations to the defendant's place of incorporation. *See Kepner*, 314 U.S. at 49–50.

2. The statute's provision for "concurrent" jurisdiction between state and federal courts also does not confer personal jurisdiction. This Court has recognized that Congress intended to overturn a mistaken interpretation of FELA as conferring exclusive *subject-matter* jurisdiction on federal courts. *See Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55–56 (1912). Other cases and statutes confirm that "concurrent" jurisdiction *always* refers only to subject-matter jurisdiction, never personal jurisdiction. *See, e.g., Growe v. Emison*, 507 U.S. 25, 32 (1993).

B. Contrary to the Montana Supreme Court's opinion, this Court has never interpreted FELA to confer personal jurisdiction on state courts. The cases cited by the Montana majority instead involved

whether a FELA case in a state court would impermissibly burden interstate commerce, *see Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286 (1932), or whether FELA preempted the traditional equitable power of state courts to enjoin their residents against pursuing vexatious litigation in other courts, *see Kepner*, 314 U.S. at 47; *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 699 (1942); *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 381 (1953).

Not one of the cases cited by the Montana Supreme Court so much as mentioned personal jurisdiction under the Due Process Clause. Respondents cannot draw support from any "drive by" jurisdictional rulings, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), especially for a waivable right like limited personal jurisdiction, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Even if the cited precedents had addressed personal jurisdiction, all but one was decided before *International Shoe*, and those cases should not attract heavy reliance today. *See Daimler*, 134 S. Ct. at 761 n.18.

C. Snippets of floor statements in FELA's legislative history are no basis for ignoring FELA's plain text. In any event, the legislative history here does not support the Montana Supreme Court's holding. Nor can the Montana Supreme Court justify its misinterpretation of the statute by resort to "liberal construction." The statutory text is not ambiguous. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

III. This Court should not construe FELA to confer personal jurisdiction in state courts because that interpretation would raise grave constitutional questions.

A. This Court has repeatedly held that Congress may not authorize the states to violate the Fourteenth Amendment. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

B. Respondents badly err in suggesting that a plurality of this Court concluded in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality op.), that Congress could authorize personal jurisdiction in state courts. The *Nicastro* plurality suggested the very opposite when it stated that personal jurisdiction must be determined on a sovereign-by-sovereign basis. *See id.* at 884.

The fact that this Court has never determined the extent of the *Fifth Amendment's* limits on Congress's power to confer personal jurisdiction is not relevant here, because Congress may not authorize *states* to violate the Fourteenth Amendment, even when Congress is not similarly constrained. *See Graham v. Richardson*, 403 U.S. 365, 382 (1971).

Finally, Respondents' position is not saved by noting that, under the Dormant Commerce Clause, states may impose otherwise-impermissible burdens on interstate commerce with the consent of Congress. The Fourteenth Amendment, unlike other clauses in the Constitution, denies powers to the states *regardless* of whether Congress consents. For blanket constitutional prohibitions like those in the Due Process Clause, this Court has long held that the states may not act even with congressional permission. *See, e.g.*, *White v. Hart*, 80 U.S. 646, 649 (1871).

ARGUMENT

This Court should reverse the judgment of the Montana Supreme Court.

I. THE DUE PROCESS CLAUSE PROHIBITS MONTANA STATE COURTS FROM EXERCISING PERSONAL JURISDICTION OVER BNSF IN THESE CASES

The Due Process Clause of the Fourteenth Amendment "sets the outer boundaries of a state tribunal's authority" to exercise personal jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). This Court's seminal opinion in *International Shoe Co. v. Washington* held that due process requires "minimum contacts" between the defendant, the forum, *and* the litigation such that the suit "does not offend traditional notions of fair play and substantial justice." 326 U.S. 310, 316 (1945) (quotation marks omitted).

A. These Cases Do Not Arise In Montana And BNSF Is Not At Home In Montana

1. Ever since *International Shoe*, this Court has interpreted the Constitution's minimum-contacts test to authorize two distinct categories of personal jurisdiction. *Goodyear*, 564 U.S. at 919. The "dominant" mode is *specific* personal jurisdiction, *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 (2014), which allows a state court to hear a suit that "arises out of or relates to the defendant's contacts with the forum," *Goodyear*, 564 U.S. at 923–24 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). By contrast, when the cause of action does not arise out of the defendant's contacts with the forum state, a state court can exercise *general* personal jurisdiction, but only if the defendant's "affiliations with the State

are so 'continuous and systematic' as to render [it] essentially at home in the forum state." *Id.* at 919 (quoting *International Shoe*, 326 U.S. at 317).

This Court in *Daimler* explained that, since *International Shoe*, it is "specific jurisdiction [that] has become the centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role." 134 S. Ct. at 755 (quotation marks omitted). In other words, cases usually must be brought where they arise. General jurisdiction exists only "as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it." *Id.* at 758 n.9 (citation omitted). For that reason, "only a limited set of affiliations with a forum will render a defendant amenable" to personal jurisdiction on claims that do not arise in the forum. *Id.* at 760.

With respect to "foreign (sister-state or foreign-country) corporations," the defendant is at home in its "place of incorporation and principal place of business." *Daimler*, 134 S. Ct. at 754, 760. Only in a case with "exceptional" facts, such as where the defendant has relocated to a "surrogate" head office in a time of war, *cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), can the defendant be at home in any other state. *Daimler*, 134 S. Ct. at 756 n.8.

The Constitution embraces these straightforward principles because "'simple jurisdictional rules ... promote greater predictability,'" which in turn facilitates the orderly administration of the laws that forms the core of due process. *Daimler*, 134 S. Ct. at 760 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)). *Daimler* rejected as "unacceptably grasping" the contention that a corporate defendant can be subject to general

jurisdiction in every state where it "engages in a substantial, continuous, and systematic course of business." 134 S. Ct. at 761. That is because general jurisdiction "does not focus solely on the magnitude of the defendant's in-state contacts," but "instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20 (quotation marks omitted).

2. A straightforward application of *Daimler* shows that the Montana state courts lack personal jurisdiction in these cases. These cases do not arise in Montana. They were brought by non-residents who never worked in Montana, were not injured in Montana, and do not allege any negligence in Montana. BNSF is not at home in Montana under the test for general jurisdiction in *Daimler*. BNSF is not incorporated in Montana and does not have its principal place of business there, and BNSF does not have a surrogate principal place of business in Montana that could make this an exceptional case.

Under *Daimler*, these cases must be dismissed for lack of personal jurisdiction.

B. The Montana Supreme Court's Distinctions Of *Daimler* Are Not Persuasive

1. The Montana Supreme Court declined to apply *Daimler* on the ground that *Daimler* "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. Respondents likewise contend that "*Daimler* is beside the point" because the Montana court's opinion was limited to FELA claims and so is not about general personal jurisdiction "as that term is used in this Court's case law." Br. in Opp. 8–9. These assertions only highlight the Montana Supreme Court's confu-

sion about this Court's personal-jurisdiction jurisprudence, which is grounded in the Due Process Clause. The constitutional right to due process does not ebb and flow based on the particular cause of action asserted or the nature of the defendant's business.

2. Equally troubling is the Montana Supreme Court's contention that *Daimler*'s holding is limited to cases with similar facts, namely claims "'brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.'" Pet. App. 11a (quoting *Daimler*, 134 S. Ct. at 750). Respondents do not defend that reasoning in this Court. *See* Br. in Opp. 8–9. That is wise, as every other state court of last resort and federal circuit court to decide the matter has held that *Daimler* is not limited to transnational cases. *See, e.g.*, *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1038 (Colo. 2016); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630 (2d Cir. 2016); Pet. 12–13. This Court should debunk the myth once and for all because a few courts still express doubt about whether *Daimler* applies in domestic cases. *See, e.g.*, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 329, 333 (W. Va. 2016).[2]

3. The Montana Supreme Court reasoned further that "if Montana residents may sue BNSF in a Montana state court for injuries that occur outside of Montana, so may residents of other states," per the Privileges and Immunities Clause of article IV, section 2.

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[2] Respondents contend that the Montana Supreme Court did not really distinguish *Daimler* based on transnational context. Br. in Opp. 9. That is incorrect. Respondents' brief to the Montana Supreme Court asked for that very distinction. *See* Pet. Reply 2 (quoting Pls.' Consolidated Answer Br. in Mont. S. Ct. 34, 36). And the Montana Supreme Court's reasoning that *Daimler* is "factually ... distinguishable," Pet. App. 15a, speaks for itself. *See* Pet. App. 11a.

Pet. App. 14a (citing *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 704 (1942)). That explanation is wrong for two reasons. First, the Montana majority's premise is incorrect: This Court has repeatedly held that personal jurisdiction does not turn on the residence of the plaintiff, even for purposes of specific personal jurisdiction. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) ("mere injury to a forum resident is not a sufficient connection to the forum"). As a result, it is not true that a Montana resident would automatically be entitled to sue BNSF in Montana for an injury that arose out-of-state. *See Goodyear*, 564 U.S. at 929 n.5 ("[G]eneral jurisdiction to adjudicate has in United States practice never been based on the plaintiff's relationship to the forum.") (quotation marks omitted).

Second, the Montana Supreme Court misunderstood the Privileges and Immunities Clause. This Court in *Miles* recognized that a state might violate the Constitution by flatly prohibiting out-of-state residents from bringing claims in the state's courts *whose* "*jurisdiction is adequate*." 315 U.S. at 704 (emphasis added). But it is the Due Process Clause that prohibits state courts from exercising the "exorbitant" personal jurisdiction that Respondents seek here. *Daimler*, 134 S. Ct. at 751. No precedent supports the Montana Supreme Court's bizarre suggestion that a state court could violate the Privileges and Immunities Clause by conforming its exercise of personal jurisdiction to the requirements of due process.

4. The Montana Supreme Court's last reason for setting aside *Daimler* was the "injustice" that would occur if injured railroad workers were required "to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses,

lawyers and parties, away from their homes." Pet. App. 6a (quoting *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 50 (1941)). But that problem was a relic of a bygone era when venue was narrowly confined to a corporation's place of incorporation. *Kepner*, 314 U.S. at 49. That era passed with the statutory expansion of venue and *International Shoe*'s recognition of specific (or case-linked) personal jurisdiction, which authorizes jurisdiction in any forum with minimum contacts between the defendant, the forum, and the litigation.

Respondents here faced no injustice: They left their homes and the locations of all the witnesses and parties in the hope of gaining an advantageous forum in Montana's courts. Under *International Shoe* and *Daimler*, Respondents were not required to go to BNSF's place of habitation to litigate. Respondents were entitled to bring these cases wherever they arose (or, at Respondents' option, in Delaware or Texas). But the Due Process Clause does not allow Respondents to bring these cases in the state courts of Montana, which lacks any connection whatsoever to the litigation. *Daimler*'s straightforward holding is directly applicable here and resolves these cases.

II. THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT CONFER PERSONAL JURISDICTION ON STATE COURTS

Given *Daimler*'s unmistakable instruction, the remaining question is whether FELA somehow expands the personal jurisdiction of the Montana state courts beyond what the Due Process Clause permits. To state the question is effectively to answer it. The Montana Supreme Court egregiously misread older FELA decisions of this Court as if they created a novel rule of personal jurisdiction for FELA cases only.

A. The Text Of The Statute Does Not Refer To Personal Jurisdiction In State Courts

The Montana Supreme Court's holding that Montana state courts "have general personal jurisdiction" over railroads doing business in the state "under the FELA," Pet. App. 15a, is refuted by the text of the statute itself and this Court's cases interpreting that text. The relevant section provides:

> ...
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56.

1. Section 56 Provides For Venue In A Federal Court

a. The statute's first sentence, by its explicit terms, is limited to cases "in a district court of the United States," and is thus entirely irrelevant to cases (like these) filed in a state court. This Court recognized in *Kepner* that Section 56 "established venue for an action *in the federal courts*." 314 U.S. at 52 (emphasis added); *see also Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 385 (1953) (Section 56 provides a "right to establish venue in the federal court").

Multiple state courts over the decades have similarly recognized that "Section 56 speaks to venue of actions in federal courts, not personal jurisdiction in

state courts," and that "[n]othing in the act addresses the matter of personal jurisdiction in the state court." *S. Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992); *see also, e.g.*, *Law v. Atl. Coast Line R.R. Co.*, 79 A.2d 252, 253 (Pa. 1951) ("It is well settled that whether a state court has jurisdiction of an action brought therein under the Federal Employers' Liability Act is to be determined by the state or local law and not by federal laws."); *Hayman v. S. Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955) (Section 56 "refers to suits in the United States District Courts and is not applicable" to cases in state court); *but see MacKinnon v. St. Louis S.W. Ry. Co.*, 518 So. 2d 89, 93 (Ala. 1987) (suggesting that Section 56 grants personal jurisdiction to state courts).

b. In fact, this Court has explained that Section 56 does not confer personal jurisdiction *at all*, even in a federal court. Rather, the statute "established *venue*" in federal cases. *Kepner*, 314 U.S. at 52 (emphasis added); *see also Pope*, 345 U.S. at 385.

Personal jurisdiction is a distinct requirement from venue (and both are distinct from subject-matter jurisdiction). *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 623 (1925) ("It is obvious that jurisdiction, in the sense of personal service within a district where suit has been brought, does not dispense with the necessity of proper venue. It is equally obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant."). "The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). "This basic difference between the court's power and the litigant's

convenience is historic in the federal courts." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Once the plaintiff has identified the federal district courts with personal jurisdiction over the defendant, limitations on venue *further* restrict the choice of forum in order "to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. at 184; *see also Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985) ("Venue provisions come into play only after jurisdiction has been established[.]").

In federal courts, venue is determined by the general venue statute (today codified at 28 U.S.C. § 1391) unless, as in FELA, another statute provides for venue more specifically. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 577 & n.2 (2013). The personal jurisdiction of federal courts, by contrast, is governed by the defendant's amenability to service of process. *See Robertson*, 268 U.S. at 622–23 ("In a civil suit in personam, jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons.").

Today, federal service is governed by Federal Rule of Civil Procedure 4(k). *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).[3] Before enactment of the Federal Rules of Civil Procedure, and

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[3] The default rule of Federal Rule of Civil Procedure 4(k)(1)(A) allows service if the defendant would be "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." *See Daimler*, 134 S. Ct. at 753 ("Federal courts ordinarily follow state law in determining the bounds of their jurisdictions over persons.").

at the time Congress amended FELA in 1910, federal law provided that "no civil suit shall be brought [in a federal court] against an inhabitant of the United States, by any original process in any other district than whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; *see also Robertson*, 268 U.S. at 623 ("ever since" the Judiciary Act of 1789, "a defendant in a civil suit can be subjected to [a federal district court's] jurisdiction in personam only by service within the district").

Both before and after adoption of the Federal Rules of Civil Procedure, when Congress intended to expand the personal jurisdiction of federal courts, it did so by providing for expanded *service of process*, as in the Clayton Act of 1914. *See Robertson*, 268 U.S. at 623–24 (noting that the original Clayton Act authorized a defendant to be "summoned although they reside in some other district"); *see also ibid.* (describing other statutes where Congress specially allowed the plaintiff "to serve the process upon a defendant in any district"); *Omni Capital*, 484 U.S. at 106 (citing more recent statutes where Congress expressly provided for nationwide service of process). Today, Federal Rule of Civil Procedure 4(k)(1)(C) allows service in a federal court "when authorized by a federal statute," and the modern Clayton Act implements that option by providing that "all process in [cases under this statute] may be served in the district of which [the defendant] is an inhabitant, or wherever it may be found." 15 U.S.C. § 22.

There are many federal statutes that expand the plaintiff's options for service (and thus the federal courts' personal jurisdiction). *See, e.g.*, 15 U.S.C. § 78aa (Securities Exchange Act); 18 U.S.C. § 1965

(RICO); 18 U.S.C. § 2334 (Antiterrorism Act); 29 U.S.C. § 1132(e)(2) (ERISA); 31 U.S.C. § 3732(a) (False Claims Act). Every one of these statutes explicitly refers to the plaintiff's options for service of process—unlike Section 56 of FELA. Appellate courts uniformly recognize, moreover, that these statutes do not confer personal jurisdiction in a *state* court. *See Hoffman v. Chandler*, 431 So. 2d 499, 501 (Ala. 1983) ("[t]he propriety of [personal] jurisdiction [in an ERISA case] is premised upon the mandate that Defendants have sufficient 'minimum contacts' within this State, so that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"); *Haught v. Agric. Prod. Credit Ass'n*, 39 S.W.3d 252, 258 (Tex. App. 2000) ("the trial court erred when it concluded that 'the court has personal jurisdiction over [defendants] under the federal civil RICO statute, 18 U.S.C. § 1965 (1999),'" because that provision applies only to cases in federal court).

Statutes that expand service of process sometimes also modify the default venue rule by either expanding or contracting federal venue. *See, e.g.*, 29 U.S.C. § 1132(e)(2) (ERISA) ("Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.").

Other statutes are like Section 56: They contain an expansive venue provision but *do not* also include a service-of-process provision. *See, e.g.*, 28 U.S.C. § 1400(a) (Copyright Act); 28 U.S.C. § 1400(b) (Patent Act); 33 U.S.C. § 918 (Longshore and Harbor Workers' Compensation Act). For those statutes, this Court has

long recognized that conferring venue is distinct from conferring personal jurisdiction. In *Robertson*, for example, this Court confronted a statute that authorized the Railroad Labor Board to subpoena a party by "invok[ing] the aid of any United States district court." 268 U.S. at 620. This Court held that although that statute modified the general rules of venue, *id.* at 623–24, the statute did not alter the courts' personal jurisdiction, *id.* at 627.

The courts of appeals likewise agree that statutes expanding venue without expanding options for service of process do not affect personal jurisdiction, even in federal courts. *See, e.g.*, *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 856 (11th Cir. 1990) (because there is no special service-of-process provision for the Copyright Act, the federal court's personal jurisdiction is determined by the forum state's long-arm statute); *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1359–60 (Fed. Cir. 2001) (personal jurisdiction in patent cases is determined by the forum state's long-arm statute); *cf. Omni Capital*, 484 U.S. at 106 (in holding that the statute at issue did confer personal jurisdiction, it was "significant" that the statute was silent as to service of process).

In short, Section 56 is not a personal-jurisdiction provision because "Congress knows how to authorize [expansive] service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention." *Omni Capital*, 484 U.S. at 106.[4]

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[4] This Court has not resolved the extent of the Fifth Amendment's limits on Congress's power to confer personal jurisdiction on federal courts. *See Omni Capital*, 484 U.S. at 104. That question is not presented here.

c. The history of Section 56 confirms that the first sentence addresses only cases in federal court, and only the matter of venue. As this Court observed in *Kepner*, the statute addressed the fact that under FELA as originally enacted, the general federal venue statute confined venue to a corporate defendant's place of incorporation. 314 U.S. at 49–50. The 1910 amendment was enacted to solve this problem with "reference to the venue" of FELA actions, by "enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business." 45 Cong. Rec., 61st Cong., 2d Sess. 4034 (1910) (Sen. Borah); *see also Kepner*, 314 U.S. at 50.

Today, FELA's grant of expansive federal venue is less important than it once was, because of two developments: First, since *International Shoe*, specific jurisdiction has become the "centerpiece of modern jurisdictional theory," so venue provisions are now relevant to a smaller number of potential forums. *See Daimler*, 134 S. Ct. at 762 n. 20 (*International Shoe* replaced a "doing business" test for personal jurisdiction with specific personal jurisdiction). Second, Congress since 1910 has significantly *expanded* the general federal venue statute. *See* 28 U.S.C. § 1391(b)(1), (c)(2) (in a suit against a corporate defendant, venue is proper "in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question"). Nevertheless, the purpose and effect of Section 56 is clear—to address venue in federal courts, not personal jurisdiction in state courts.

2. Section 56 Confirms The Subject-Matter Jurisdiction Of State Courts

a. The second sentence of 45 U.S.C. § 56 provides that "[t]he jurisdiction of the courts of the United

States under this chapter shall be concurrent with that of the courts of the several States." The Montana Supreme Court stated that Section 56 "does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction, [and] the U.S. Supreme Court has never given it such an interpretation." Pet. App. 14a. That is plainly wrong.

Every decision of this Court interpreting this clause has described it not in terms of state courts' personal jurisdiction, but of subject-matter jurisdiction—that is, "[t]he character of the controversies over which ... judicial authority may extend." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). *See Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 59 (1912) (Section 56 means "that rights arising under [FELA] may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."); *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387 (1929) (FELA "does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned"); *Miles*, 315 U.S. at 703 (Section 56 concerns "[t]he opportunity to present causes of action arising under the [FELA] in the state courts"). In *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3 (1950), this Court treated it as a given that a FELA case may be brought only where "the State has acquired jurisdiction over the defendant."

b. This Court explained more than a century ago—and just two years after Section 56 was added to

FELA—that this clause was added to correct the mistaken holding of the Supreme Court of Errors of Connecticut (in *Hoxie v. New York, New Haven & Hartford Railroad Co.*, 73 A. 754 (Conn. 1909)) that Congress had meant for the original version of FELA to withdraw *subject-matter* jurisdiction over FELA claims from state courts. *Second Employers' Liability Cases*, 223 U.S. at 55 (*Hoxie* held "that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts."). That was error, *see id.* at 56, and Congress sought to correct it one year later "by an express declaration that there is no intent on the part of Congress to confine remedial actions brought under the [FELA] to the courts of the United States," J. C. Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 L. & Contemp. Probs. 367, 371 n.17 (1953) (quoting H.R. Rep. No. 513, at 7, 61st Cong., 2d Sess. Febr. 22, 1910 (Rep. Sterling)); *see also* W. W. Thornton, *Federal Employers' Liability Act*, 215–16 (2d ed. 1912) ("This amendment was made to confer jurisdiction upon state courts, because of the decision of the Supreme Court of Connecticut, which was severely criticized and declared to be erroneous."). Congress thus enacted the second sentence of Section 56 as it exists today, which was universally understood to confirm the subject-matter jurisdiction of state courts over FELA cases. Thornton, *supra*, at 215–216; *see also* Jacob Aronson, *Federal Employers' Liability Act*, 2 Brook. L. Rev. 37, 37 (1933) (Section 56 provides that state courts "have been invested with jurisdiction to try actions instituted pursuant to the Act").

c. This Court in the *Second Employers' Liability Cases* noted that the second sentence of Section 56, "instead of granting jurisdiction to the state courts, presupposes that they already possessed it." 223 U.S.

at 56. That is because the Constitution's default rule is that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also* The Federalist No. 82, p. 555 (J. Cooke ed. 1961) (A. Hamilton) (the Constitution establishes that "the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited").

This Court has contrasted this default rule of "concurrent jurisdiction" over a subject matter with "exclusive jurisdiction" over that subject, which Congress may confine to the federal courts. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (the Court "begins with the presumption that state courts enjoy concurrent jurisdiction," but Congress "may confine jurisdiction to the federal courts either explicitly or implicitly"); *Claflin v. Houseman*, 93 U.S. 130, 136 (1898). Neither "concurrent jurisdiction" nor "exclusive jurisdiction" refers to a court's power over the *person* of the defendant.

In fact, "concurrent" jurisdiction as used in Section 56 has *always* been understood to refer to subject-matter jurisdiction, not personal jurisdiction. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 32 (1993) ("federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter"); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517–18 (1898) ("the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject matter can constitutionally be made

cognizable in the federal courts; and ... without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter" (quoting 1 J. Kent, *Commentaries on Am. Law* 374–75 (1826))).

Many federal statutes refer to "concurrent" jurisdiction between state and federal courts. *See, e.g.*, 11 U.S.C. § 526(c)(4) (providing for concurrent jurisdiction over claims under certain debt-collection laws); 15 U.S.C. § 3007(c) (Interstate Horseracing Act); 16 U.S.C. § 403c-1(g) (providing for concurrent jurisdiction over civil actions arising within Shenandoah National Park); 22 U.S.C. § 9003(a) (International Child Abduction Remedies Act); 28 U.S.C. § 1352 (providing for concurrent jurisdiction over claims related to federal bonds); 29 U.S.C. §§ 1132(e)(1), 1451(c) (ERISA); 42 U.S.C. § 13981(e)(3) (Violence Against Women Act); 49 U.S.C. § 11501(c) (Railroad Revitalization and Regulatory Reform Act); 49 U.S.C. § 14502(c)(1) (providing for concurrent jurisdiction over claims to prevent various actions deemed to burden and discriminate against interstate commerce). These statutes have always been understood to confirm state court's subject-matter jurisdiction, never to confer personal jurisdiction. *See, e.g.*, *Am. Airlines, Inc. v. Cty. of San Mateo*, 912 P.2d 1198, 1207 (Cal. 1996) (observing that 49 U.S.C. § 11501(c) "accord[s] federal district and state courts concurrent *jurisdiction over claims* within their purview") (emphasis added); *Hoffman*, 431 So. at 501–504 (even though 29 U.S.C. § 1132(e)(1) confers "concurrent" jurisdiction, a state court's personal jurisdiction in an ERISA case is determined by its long-arm statute and *International Shoe*).

d. This Court has never suggested that Congress even has the power to affect the personal jurisdiction of state courts. Even as the Court has held that "a state court *of competent jurisdiction*" may not discriminate against federal law by refusing to hear federal causes of action, *Howlett v. Rose*, 496 U.S. 356, 369–72 (1990) (emphasis added), the Court has affirmed that states "have great latitude to establish the structure and jurisdiction of their own courts," *id.* at 372. Section 56 of FELA is an example of this rule: The statute is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. at 56. Instead, FELA creates an obligation on a state court only "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under [FELA] and susceptible of adjudication according to the prevailing rules of procedure." *Id.* at 56–57. In other words, Section 56 makes clear that FELA "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 59.

e. In another clause of the same 1910 amendment to FELA, Congress provided a different form of protection for the plaintiff's choice of forum by prohibiting removal to federal court of FELA actions filed in state court *of competent jurisdiction*. *See Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918). A court "of competent jurisdiction" traditionally refers to a court that has both subject-matter jurisdiction *and* personal jurisdiction. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017) (citing cases). The fact that Congress barred removal from state courts "of competent

jurisdiction" in FELA Section 56 is further proof that Congress recognized the plaintiff's choice of forum was not absolute.

The Montana Supreme Court's opinion missed the fundamental difference between state courts' subject-matter jurisdiction, which can be granted or withdrawn by Congress, and state courts' personal jurisdiction, which is not "adequate to the occasion" in these cases, *Second Employers' Liability Cases*, 223 U.S. at 59, because of the constraints of the Due Process Clause.

B. The Montana Supreme Court Misread This Court's Older Cases, Which Did Not Interpret FELA To Confer Personal Jurisdiction On State Courts

The Montana Supreme Court stated that "decades of consistent U.S. Supreme Court precedent dictat[e] that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet. App. 12a. That is profoundly wrong. As the dissenting justice below pointed out, not one of these cases so much as mentioned personal jurisdiction under the Due Process Clause. *See* Pet. App. 27a–28a.

1. In *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284, 285–86 (1932), a plaintiff injured in Colorado sued two railroads (the Rio Grande and the Santa Fe) under FELA in Missouri state court. The trial court denied the railroads' motion to quash the attachment and summonses. *Ibid.* The railroads then unsuccessfully petitioned the Supreme Court of Missouri for a writ of prohibition to enjoin the trial judge against continuing to exercise jurisdiction, arguing that "if the case proceeded to trial an undue burden on interstate commerce would result; also the commerce clause of the Federal Constitution and the

Fourteenth Amendment would be violated." *Id.* at 285.

This Court held that the Santa Fe railroad, which operated rail lines in Missouri (among other states), was "properly sued" in Missouri "[a]ccording to the doctrine approved in *Hoffman v. State of Missouri ex rel. Foraker*, 274 U.S. 21 [(1927)]." *Terte*, 284 U.S. at 287. *Foraker*, decided five years earlier, was not a case about personal jurisdiction. The Court in *Foraker* held that a suit against a railroad in Missouri for an injury arising outside the state did not impermissibly "burden interstate commerce" because the railroad was incorporated in Missouri, operated its railroad there, and was sued in a county where it had an agent and a usual place of business. 274 U.S. at 22–23.

This Court's opinion in *Terte* relied exclusively on *Foraker* and the Dormant Commerce Clause; the Court never discussed the Due Process Clause or the meaning of Section 56.

2. Even further afield is *Kepner*, 314 U.S. 44, which considered "whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act in a federal court of another state where the Act gave venue, on the ground that the prosecution in the federal court is inequitable, vexatious and harassing to the carrier." *Id.* at 47. The case arose from an injury in Ohio to a railroad employee who was a resident of Ohio, but who sued the railroad in federal court in New York, which was one state where the railroad did business. *Id.* at 48. The railroad then sued in Ohio state court to enjoin the New York proceeding, arguing "that the continued prosecution of the federal court action would be

an undue burden on interstate commerce and an unreasonable, improper and inequitable burden upon [the railroad] itself." *Ibid.* The Ohio courts refused to enjoin the New York suit.

This Court's opinion in *Kepner* first rejected the railroad's argument claiming an impermissible burden on interstate commerce, citing *Terte* and *Foraker*. *See* 314 U.S. at 51. The Court then addressed the argument that the Ohio court should have enjoined the New York case as vexatious and inequitable. *Ibid.* This Court affirmed that a state court has the traditional power to enjoin its residents from carrying on vexatious litigation in other courts. *Id.* at 52 (citing, *e.g.*, *Cole v. Cunningham*, 133 U.S. 107, 118–20 (1890)). Nevertheless, this Court held that Section 56 of FELA preempted that power, because the statute was intended to grant plaintiffs a wide choice of federal venue. *Id.* at 53–54. The Court held that "[a] privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense." *Id.* at 54.

Kepner by its own terms had nothing at all to do with the personal jurisdiction of state courts or with the Due Process Clause. Contrary to the conclusion of the Montana Supreme Court, the case does not remotely stand for the proposition that a state court can exercise personal jurisdiction in a FELA case so long as the defendant is doing business in the forum.

3. This Court's decision in *Miles*, 315 U.S. 698, was very similar to *Kepner* (and decided only one year later), except it concerned "the power of a state court to enjoin its citizens, on the ground of oppressiveness and inequity to the defendant carrier, from suing on a [FELA] claim in the *state courts* of another state." *Id.* at 699 (emphasis added).

This Court again held that a state court cannot enjoin out-of-state litigation as a burden on interstate commerce where the railroad does business in the forum, because "despite the incidental burden on commerce," Congress "has exercised its authority over interstate commerce to the extent of permitting suits in state courts ... *where process may be obtained on a defendant* ... actually carrying on railroading." *Miles*, 315 U.S. at 701–02 (emphasis added).

Moreover, just as in *Kepner*, the Court again held that FELA preempted the equitable power of state courts to enjoin litigation in other state courts of adequate jurisdiction. *Miles*, 315 U.S. at 703–04. Because Congress intended to allow state courts to exercise subject-matter jurisdiction over FELA cases, that opportunity was "no more subject to interference by state action than was the federal venue in the *Kepner* case." *Id.* at 704. And "[s]ince the existence of the cause of action and the privilege of vindicating rights under the [FELA] in state courts spring from federal law, the right to sue in state courts of proper venue *where their jurisdiction is adequate* is of the same quality as the right to sue in federal courts." *Ibid.* (emphasis added). *Miles*, like *Kepner*, never mentioned state courts' personal jurisdiction or the Due Process Clause.

4. The Montana Supreme Court's last claim to precedent was *Pope*, 345 U.S. 379. *Pope* was "indistinguishable" from *Miles* and presented exactly the same issue; the only question was whether Congress had since abrogated *Miles* by enacting 28 U.S.C. § 1404(a), which allowed a federal court to transfer venue to another federal district where the case might have been brought "'[f]or the convenience of parties and witnesses, in the interest of justice.'" 345 U.S. at 383.

This Court held that although Section 1404(a) allowed federal courts to transfer venue, the statute said nothing about the power of state courts to enjoin vexatious litigation, and *Miles* therefore still prevented state courts from exercising that equitable authority in FELA cases. *Pope*, 345 U.S. at 384–87. *Pope*, unsurprisingly, did not mention state courts' personal jurisdiction or the Due Process Clause.

5. Respondents attempt to draw support from the fact that some state courts in these cases apparently exercised jurisdiction over out-of-state defendants that were merely doing business in the forum. Br. in Opp. 2, 15–16. But that reasoning is impermissible, because "drive-by jurisdictional rulings of this sort ... have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). The rule is particularly forceful in the context of a waivable right like limited personal jurisdiction. *See Insurance Corp. of Ireland*, 456 U.S. at 703.

Moreover, even if these cases had concerned personal jurisdiction, every one save *Pope* was decided before *International Shoe*, in the era when companies were routinely subjected to personal jurisdiction "based on the presence of a local office, which signaled that the corporation was 'doing business' in the forum." *Daimler*, 134 S. Ct. at 761 n.18. *International Shoe* abrogated the jurisdictional approach of this prior era, *see id.* at 753–54, and personal-jurisdiction cases pre-dating *International Shoe* "should not attract heavy reliance today," *id.* at 761 n.18.

C. Respondents Cannot Overcome Statutory Text And Precedent By Legislative History Or "Liberal Construction"

1. Respondents contend that Section 56 "confers personal jurisdiction on federal courts" in every district where the railroad does business, and so it "likewise" authorizes personal jurisdiction on state courts. Br. in Opp. 19–20. As shown above, *supra* Part II.A.1.b., the premise of Respondents' argument is wrong: FELA does not confer personal jurisdiction even in federal courts. Regardless, Respondents' conclusion also does not follow. "Personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.); *see also Second Employers' Liability Cases*, 223 U.S. at 58 ("the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other"). "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular state." *Nicastro*, 564 U.S. at 884. No matter where BNSF might be suable in federal court, nothing in Section 56 purports to make BNSF subject to personal jurisdiction in state courts.

2. The Montana Supreme Court attempted to get around this fatal defect in Respondents' argument by invoking a statement by Senator Borah, "who submitted the report on the bill" adding Section 56, to the effect that the amendment was meant to enable the plaintiff "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." Pet. App. 6a–7a (quoting *Kepner*, 314 U.S. at 50) (quotation marks omitted). Even if Senator Borah's remarks

were helpful to Respondents, one sentence of a floor statement by one Senator cannot overcome clear statutory text, the context of the provision, and a consistent body of interpretative precedent from this Court. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

In any event, Senator Borah notably did *not* claim that Section 56 conferred personal jurisdiction on a state court. His quoted statement describing where a plaintiff may lodge his FELA action was an explanation for the *first* sentence of Section 56, which he said "has reference to the venue" of FELA cases. 45 Cong. Rec. at 4034 (Sen. Borah). Senator Borah also understood that the reference to "concurrent jurisdiction" in the second Sentence of 56 refers to "jurisdiction *of the case*"—that is, subject-matter jurisdiction. *Id.* at 4035.

3. The Montana Supreme Court also fell back to arguing that this Court has given FELA a "liberal construction to accomplish its humanitarian and remedial purposes." Pet. App. 18a. But "[i]t does not follow ... that this remedial purpose requires [this Court] to interpret every uncertainty in the Act in favor of employees." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). Words matter in statutes. "FELA's text does not support the proposition that" the statute confers personal jurisdiction on state courts, "and the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Ibid.*

* * *

Under the Montana Supreme Court's interpretation of Section 56, railroads might conceivably be sued in any county in any state where they operate, even if the railroad does no business in that county. *See Bur-*

lington N. R.R. Co. v. Ford, 504 U.S. 648 (1992) (holding that when a state has acquired personal jurisdiction over a defendant, the state may allow that defendant to be sued in any county). Montana has 56 counties, and hundreds more exist in the 27 other states where BNSF operates. Under the Montana Supreme Court's theory, a railroad could be subject to jurisdiction in any one of these counties if a state long-arm statute allowed it.

The Montana Supreme Court's interpretation of Section 56 violates quintessential principles of due process by subjecting railroads to "the burdens of litigating in a distant or inconvenient forum," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), and by depriving railroads of "'some minimum assurance'" as to where they will and will not be "liable to suit.'" *Daimler*, 134 S. Ct. at 761–62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The decision below also allows Montana's courts to "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system," *World-Wide Volkswagen*, 444 U.S. at 292, and pass judgment on cases over which they have no lawful sovereign authority because the cases have no connection to Montana. *See Nicastro*, 564 U.S. at 884 (plurality op.) ("due process protects the individual's right to be subject only to lawful power," but "whether a judicial judgment is lawful depends on whether the sovereign has authority to render it"); *Burger King*, 471 U.S. at 471–72 (due process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations'" (quoting *International Shoe*, 326 U.S. at 319)).

In sum, this Court need not do any more than confirm what FELA's text plainly says: The statute does not confer personal jurisdiction on state courts.

III. Congress Could Not Confer On State Courts Personal Jurisdiction That The Due Process Clause Forbids

The statutory text resolves these cases. To the extent that any ambiguity persists, this Court should not read FELA to attempt to confer personal jurisdiction that the Due Process Clause forbids, which would cast the statute into grave constitutional doubt. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 247–51 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt.").

Congress does not have the power to authorize state courts to exercise personal jurisdiction beyond the limitations of the Due Process Clause. If FELA really did attempt to confer personal jurisdiction in the courts of every state where a railroad operates, then the statute is unconstitutional.

A. Congress Does Not Have The Power To Enable States To Act Contrary To The Fourteenth Amendment

This Court has repeatedly held that Congress does not have the power to authorize states to violate the Fourteenth Amendment. In *Shapiro v. Thompson*, 394 U.S. 618, 622 (1969), this Court considered state statutes that denied welfare assistance to persons who had not resided within the state for at least one year. The Court struck down the restrictions as a violation of the Equal Protection Clause. *Id.* at 638. The states responded that Congress had expressly approved the imposition of the residency requirements

in federal law. *Ibid.* But this Court held that the federal statute, "insofar as it permits the one-year waiting-period requirement, would be unconstitutional." *Id.* at 641. For "Congress may not authorize the States to violate the Equal Protection Clause." *Ibid.*

Similarly, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982), this Court struck down a statute excluding males from enrolling in a state-supported professional nursing school, holding that the restriction was sex discrimination in violation of the Equal Protection Clause. *Id.* at 731. The Court rejected the defendant's contention that the policy had been authorized by federal statute: "Although [the Court] give[s] deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Id.* at 732–33.

It makes no difference that these cases concerned violations of the Equal Protection Clause, whereas here the Montana Supreme Court held that FELA supersedes the limitations of the Fourteenth Amendment's Due Process Clause. This Court has held that the Due Process Clause is the source of essential guarantees to civil defendants including the right to "notice" of the proceeding, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), a "hearing appropriate to the nature of the case," *ibid.*, and a judge without a conflict of interest, *e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009). *Cf.* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1279–95 (1975) (describing the components of a fundamentally fair hearing for all civil and criminal proceedings). The Clause also protects civil defendants against "grossly excessive" punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)

(quotation marks omitted). Nothing in our constitutional tradition supports Respondents' position that Congress could withdraw these fundamental protections for liberty and property by statute. *See* 1 Laurence Tribe, *American Constitutional Law* 1238 (3d ed. 2000) ("Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action (such as the commands of § 1 of the Fourteenth Amendment).").

The matter is not hypothetical. This Court has held that the Due Process Clause of the Fourteenth Amendment prohibits the states from denying marriage to same-sex couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Yet Section 2 of the Defense of Marriage Act, 28 U.S.C. § 1738C, which was not at issue in *United States v. Windsor*, 133 S. Ct. 2675, 2682–83 (2013), purports to authorize states to refuse to recognize same-sex marriages performed under the laws of other states. *Ibid.* Respondents' argument would allow this Court's constitutional holding in *Obergefell* to be undone by federal statute. *But see Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 981 n.9 (S.D. Ohio 2013) (holding that DOMA Section 2 "does not provide a legitimate basis for otherwise constitutionally invalidated state laws" restricting marriage).

B. Respondents Offer No Persuasive Theory That Congress Can Supersede The Fourteenth Amendment By Statute

1. The Montana Supreme Court offered no defense at all, and did not cite a single case, for its conclusion that Congress can supersede the Fourteenth Amendment by statute. Respondents, for their part, attempt to supply a rationale first by contending that a plurality of this Court suggested in *Nicastro*, 564 U.S. at 885,

that "Congress could exercise its power to confer personal jurisdiction on state courts." Br. in Opp. 17. That is spectacularly wrong. Just two sentences after the passage that Respondents quote, the *Nicastro* plurality was clear that it referred to a hypothetical statute "authoriz[ing] jurisdiction in a *federal court* in New Jersey." 564 U.S. at 885–86 (emphasis added).

In fact, the *Nicastro* plurality opinion stands strongly for the *opposite* of the Montana Supreme Court's holding here by stating that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign analysis," and recognizing that "the United States is a distinct sovereign." 564 U.S. at 884. The plurality's analysis in *Nicastro* confirms that only state legislatures—not Congress—have the sovereign power to alter their state courts' personal jurisdiction. And the legislatures may act only subject to the constraints of the Due Process Clause. *See* U.S. Const. amend. XIV.

2. Respondents further contend that "Congress's authority," unlike that of the states, "is not limited by state boundaries," Br. in Opp. 18, and this Court has "not directly addressed whether and to what extent" the Fifth Amendment's Due Process Clause limits Congress's power to confer personal jurisdiction on federal courts. Br. in Opp. 19 n.3 (citing *Omni Capital*, 484 U.S. at 102 n.5). This Court has strongly suggested that the Due Process Clause imposes *some* limit on federal courts' personal jurisdiction. *See Omni Capital*, 484 U.S. at 104. Regardless, these points do not help Respondents here. Even if the Constitution does not limit Congress's power to confer expansive personal jurisdiction in federal courts, this Court's cases establish that Congress does not have

the power to supersede the limitations on state authority in the Due Process Clause.

When the Fourteenth Amendment imposes a prohibition on the states, Congress cannot authorize the states to take the forbidden action even if Congress *could* itself enact the same policy as a matter of federal law. In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), for example, this Court struck down under the Equal Protection Clause a state statute that restricted welfare benefits to United States citizens or aliens that had lived in the state for a specified number of years, notwithstanding the state's argument that the restriction was authorized by federal law, *id.* at 380. This Court has elsewhere held that Congress, unlike the states, *can* constitutionally condition aliens' eligibility for federal benefits on the nature and duration of their residency in the United States, pursuant to Congress's power in the Naturalization Clause. *See Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976). But this Court in *Graham* nevertheless categorically determined that, "[a]lthough the Federal Government admittedly has broad constitutional power" in this area, "Congress does not have the power to authorize the individual states to violate the Equal Protection Clause." 403 U.S. at 382.

3. Finally, Respondents note that Congress has the power to "authorize state regulations that burden or discriminate against interstate commerce," even though those regulations would, absent congressional authorization, be unconstitutional. Br. in Opp. 18 (citing *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003)). But that gets Respondents nowhere, because the Dormant Commerce Clause has a materially different structure in the Constitution than does the Due Process Clause. This Court has interpreted Congress's

power to regulate interstate commerce in article I, section 8 to mean that Congress has the *exclusive* power to regulate interstate commerce, including by authorizing state laws that burden interstate commerce. *See Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015). That is, the Court has interpreted the regulation of interstate commerce to be similar to other governmental powers that the Constitution withholds from the states "without the Consent of Congress," such as "keep[ing] Troops, or Ships of War in time of Peace," or "enter[ing] into any Agreement or Compact with another State, or with a foreign Power." U.S. Const. art. I, § 10, cl. 3.

By contrast, other clauses in the Constitution unequivocally deny powers to the states *without* making allowance for congressional consent. *See, e.g.*, U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty[;] ... coin Money; ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"). This Court has interpreted those clauses to mean that the states may *never* exercise those powers, even with congressional approval. *See, e.g.*, *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) ("the words 'agreement' and 'compact[ ]' cannot be ... held to mean the same thing with the word 'treaty' in the preceding clause, into which the states are positively and unconditionally forbidden to enter; and which even the consent of Congress could not authorize").

Importantly, the states may not exercise these powers by congressional authorization even when Congress is not similarly constrained. The Contracts Clause, for example, does not restrict the federal government as it does the states. *See Pension Benefit Guar. Corp. v. R.A. Gray*, 467 U.S. 717, 732–33 & n.9

(1984). But the states are nevertheless absolutely prohibited from impairing the obligation of contracts: Even "if Congress had expressly dictated and expressly approved the [state] proviso in question [impairing preexisting contracts], such dictation and approval would be without effect. *Congress has no power to supersede the National Constitution.*" *White v. Hart*, 80 U.S. 646, 649 (1871) (emphasis added).

The Due Process Clause of the Fourteenth Amendment has the same structure as the Contracts Clause and the Equal Protection Clause: It unequivocally prohibits the states from depriving a person of property without due process of law, without any exception for congressional approval. Congress has no power to authorize states to violate the Due Process Clause.

* * *

The judgment below depends on the Montana Supreme Court's erroneous contention that *Daimler*'s constitutional rule does not apply to domestic railroads doing business in Montana. But "[t]here can be no serious doubt that it does." *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (citing U.S. Const. art. VI, cl. 2). Nor can the Montana Supreme Court evade *Daimler*'s reach by grafting onto FELA a grant of personal jurisdiction to state courts that by text is not there—and under the Constitution could not be.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

U.S. Constitution, Amendment 14, Section 1

No State shall ... deprive any person of life, liberty, or property, without due process of law ...

***

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

***

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

***

Federal Rule of Civil Procedure 4. Summons

...

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule

4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

(d) Waiving Service.

(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

...

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if

the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

...

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

...

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

***

Montana Rule of Civil Procedure 4. Persons Subject to Jurisdiction; Process; Service.

(a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, a resident of this state, or organized under the laws of this state, includes:

(1) an individual, whether operating in the individual's own name or under a trade name;

(2) an individual's agent or personal representative;

(3) a corporation;

(4) a limited liability company;

(5) a business trust;

(6) an estate;

(7) a trust;

(8) a partnership;

(9) an unincorporated association;

(10) any two or more persons having a joint or common interest or any other legal or commercial entity; and

(11) any other organization given legal status as such under the laws of this state.

(b) Jurisdiction of Persons.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

(A) the transaction of any business within Montana;

(B) the commission of any act resulting in accrual within Montana of a tort action;

(C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;

(D) contracting to insure any person, property, or risk located within Montana at the time of contracting;

(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;

(F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or

(G) acting as personal representative of any estate within Montana.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by Montana courts over any person:

(A) through service of process as herein provided; or

(B) by the voluntary appearance in an action by any person either personally or through an attorney, authorized officer, agent, or employee.

...

(d) Service.

(1) In General. The summons and complaint must be served together. The plaintiff must furnish the necessary copies to the person who makes service.

(2) In Person. Service of all process may be made in the county where the party to be served is found by a sheriff, deputy sheriff, constable, or any other person over the age of 18 not a party to the action.

(3) (A) By Mail. A summons and complaint may also be served by mailing via first class mail, postage prepaid, the following to the person to be served:

(i) a copy of the summons and complaint;

(ii) two copies of a notice and acknowledgment conforming substantially to form 18-A; and

(iii) a return envelope, postage prepaid, addressed to the sender.

(B) A summons and complaint may not be served by mail to the following:

(i) A minor;

(ii) An incompetent person; or

(iii) A corporation, partnership, or other unincorporated association, whether domestic or foreign.

(C) If no acknowledgment of service by mail is received by the sender within 21 days after the date of mailing, service of the summons and complaint must be made in person.

(D) If a person served by mail does not complete and return the notice and acknowledgment within 21 days, the court must order that person to pay the costs of personal service unless good cause is shown for not doing so.

(E) The notice and acknowledgment must be signed and dated by the de-

fendant, and service of summons and complaint will be deemed complete on the date shown.

...

(i) Serving a Business or Nonprofit Entity.

(1) For the purposes of this Rule, a business or nonprofit entity includes the following:

(A) a corporation;

(B) a limited liability company;

(C) a partnership;

(D) any other unincorporated association; and

(E) any business entity that has filed with the office of the secretary of state.

(2) Service is available under this rule for a domestic business or nonprofit entity, as well as a foreign business or nonprofit entity that either:

(A) has a place of business in Montana;

(B) does business in Montana permanently or temporarily; or

(C) was doing business in Montana permanently or temporarily at the time the claim for relief accrued.

(3) A business or nonprofit entity must be served by either:

(A) delivering a copy of the summons and complaint to:

(i) an officer;

(ii) a director;

(iii) a manager;

(iv) a member of a member-managed limited liability company;

(v) a superintendent;

(vi) a managing agent;

(vii) a general agent; or

(viii) a partner;

(B) leaving copies of the summons and complaint at the office or place of business within Montana with the person in charge of such office;

(C) delivering a copy of the summons and complaint to the registered agent named on the records of the secretary of state;

(D) delivering a copy of the summons and complaint to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the business or nonprofit entity, provided that if the agent or attorney in fact is designated by statute to receive service, further notice as required by the statute must also be given; or

(E) if the suit is against a business or nonprofit entity whose charter or right to do business in Montana has expired or been forfeited, by delivering a copy of the summons and complaint to its trustees or stockholders or members.

(j) Serving a Corporation or Limited Liability Company When Persons Designated Under Rule 4(i) Cannot Be Found Within Montana.

(1) This Rule applies when none of the persons designated in Rule 4(i) can be found within Montana with the exercise of due diligence, and a claim for relief is pending in any Montana court against the following:

(A) a corporation or limited liability company that has filed a copy of its charter in the office of the Montana secretary of state and is qualified to do business in Montana;

(B) a corporation or limited liability company which is subject to the jurisdiction of Montana courts under Rule 4(b), even though it has never qualified to do business in Montana; or

(C) a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana.

(2) The party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any person designated under Rule 4(i).

(3) If, after exercising reasonable diligence, the party causing summons to be issued is unable to accomplish service, the following must be filed with the clerk of the court in which the claim for relief is pending:

(A) an affidavit reciting that none of the persons designated in Rule 4(i) can be found within Montana, as well as a recitation of either:

(i) the last known address of any person designated under Rule 4(i); or

(ii) a statement that no address for any person designated under Rule 4(i) could be found after the exercise of reasonable diligence; and

(B) $10 deposited with the clerk to be paid to the secretary of state as a fee for each defendant for whom the secretary of state is to receive service. When service is requested at more than one address, an additional $10 must be paid for each party to be served at each additional address.

(4) An affidavit filed pursuant to Rule 4(j)(3)(A) reciting that diligent inquiry was made is sufficient evidence of the diligence of inquiry. The affidavit need not detail the facts constituting such inquiry. The affidavit may also be combined in the same instrument with the affidavit required under Rules 4(o)(3)(A)(ii) and 4(p), should an affidavit under these Rules be required.

(5) Upon receiving the necessary affidavit and fees as required under Rule 4(j)(3), the clerk of court must:

(A) issue an order directing process to be served upon the Montana secretary of state or, in the secretary of state's absence, upon the Montana deputy secretary of state; and

(B) mail to the secretary of state at the office of the secretary of state:

(i) the original summons;

(ii) one copy of the summons and affidavit for the files of the secretary of state;

(iii) one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state; and

(iv) the fee for service.

(6) (A) Upon receiving the materials required under Rule 4(j)(5)(B), the secretary of state must mail a copy of the summons and complaint by certified mail, return receipt requested, either:

(i) to the last known address of any of the persons designated in Rule 4(i); or

(ii) if the corporation or liability company is not organized in

Montana and no address for a person designated under Rule 4(i) is known, to the secretary of state of the state in which the corporation or limited liability company was originally incorporated, if known.

(B) The secretary of state must also make a return as provided in Rule 4(p).

(7) Service made in accordance with this Rule is deemed personal service on the corporation or limited liability company and the secretary of state, or a deputy in the absence of the secretary of state, is thereby appointed agent of the corporation or limited liability company for service of process.

(8) (A) If a person designated in Rule 4(i) is located and served personally as provided by this Rule, service is deemed complete upon the corporation or limited liability company regardless of the receipt of any return receipt or advice by the postal authority of refusal of the addressee to receive the process mailed.

(B) If a person designated in Rule 4(i) is not located or served personally as provided by this Rule, service by publication must also be made as provided in Rules 4(c)(2)(D) and 4(o)(4). Such publication must first be made within 60 days from the date the original summons is mailed to the secretary of state. If such first publication is not made, the action shall be deemed dismissed as to any corporation or limited liability company intended to be served by

such publication. Service by publication in accordance with this Rule is complete upon the date of the last publication of summons.

(9) When service of process is made in accordance with this Rule, and there is no appearance thereafter made by any attorney for such corporation or limited liability company, service of all other notices required by law to be served in such action may be served upon the secretary of state.

...

(n) Personal Service outside Montana.

(1) When a person cannot, with due diligence, be served personally within Montana, service may be made outside Montana in the manner provided for service within Montana. Such service has the same force and effect as though it had been made within Montana.

(2) Where service by publication is permitted, personal service of the summons and complaint upon the defendant outside Montana is equivalent to and dispenses with the procedures, publication, and mailing provided for in Rules 4(o)(3), 4(o)(4), and 4(o)(5).

(o) Service by Publication.

(1) When Permitted. A defendant who has not been served under the foregoing sections of Rule 4 can only be served by publication in the following situations:

(A) when the subject of the action is real or personal property in Montana in

which the defendant has or claims an actual or contingent lien or interest, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein;

(B) when the action is to foreclose, redeem from, or satisfy a mortgage, claim, or lien upon real or personal property within Montana;

(C) when the action is for dissolution, legal separation or a declaration of invalidity of a marriage of a Montana resident, or for modification of a decree of dissolution or order on custody, visitation, support, or a parenting plan granted by a Montana court; or

(D) when the defendant has property within Montana which has been attached or has a debtor within Montana who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under Rules 4(o)(1)(A), 4(o)(1)(B), or 4(o)(1)(C).

(2) Effect of Service by Publication. When a defendant has been served by publication as provided in this Rule, any Montana court having jurisdiction may render a decree adjudicating any interest of such defendant in the status, property, or thing acted upon. Such a decree does not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(3) Filing of Pleading and Affidavit for Service by Publication; Order for Publication.

(A) Before service of the summons by publication is authorized, the following must be filed with the clerk of the district court of the county in which the action is commenced:

(i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in Rule 4(o)(1); and

(ii) a) in situations defined in Rules 4(o)(1)(A), 4(o)(1)(B), and 4(o)(1)(C), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that either:

1. such defendant resides out of Montana;

2. such defendant has departed from Montana;

3. such defendant cannot, after due diligence, be found within Montana;

4. such defendant conceals the defendant's person to avoid the service of summons;

5. the defendant is a business or nonprofit entity as defined in Rule 4(i)(1) of which none of the persons in Rule 4(i) can, after due diligence, be found within Montana; or

6. the defendant is an unknown claimant and the affiant has made diligent search and inquiry for all persons who claim or might claim any present or contingent right, title, estate, interest in, lien, or encumbrance upon such property or any part thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, including any right of inchoate or accrued dower, and that the affiant has specifically named as defendants in such action all such persons whose names can be ascertained.

b) Such affidavit is sufficient evidence of the diligence of any inquiry made by the affiant if it recites the fact that diligent inquiry was made. The facts constituting such inquiry need not be detailed.

c) Such affidavit may be with the affidavit required under Rules 4(j)(3)(A) and 4(p), should an affidavit under these Rules be required.

(iii) In the situation defined in Rule 4(o)(1)(D), proof that a valid attachment or garnishment has been effected must first be presented to the court.

(B) Upon complying herewith, the plaintiff must obtain an order, issued either by the judge or clerk of court, for the service of summons to be made upon the defendants by publication.

(4) Number of Publications. Service by publication must be made by publishing the summons once a week for three successive weeks in a newspaper published in the county in which the action is pending or, if no newspaper is published in such county, then in a newspaper published in an adjoining county that has a general circulation therein.

(5) Mailing Summons and Complaint. A copy of the summons and complaint, at any time after the filing of the affidavit for publication but not later than 14 days after the first publication of the summons, must be mailed, postage prepaid, to the defendant at defendant's place of residence, unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a business or nonprofit

entity as defined in Rule 4(i)(1), and personal service cannot with due diligence be effected within Montana on any of the persons designated in Rule 4(i), then the secretary of state must be served pursuant to Rule 4(j).

(6) Time When First Publication or Service outside Montana Must Be Made. The first publication of summons or personal service of the summons and complaint upon the defendant out of Montana must be made within 60 days after the filing of the affidavit for publication. If not, the action must be dismissed as to any party intended to be served by such publication.

(7) When Service by Publication or Outside Montana Complete. Service by publication is complete on the date of the last publication of the summons or, in case of personal service of the summons and complaint upon the defendant out of Montana, on the date of such service.

...

(t) Time Limit for Issuance and Service of Process.

(1) A plaintiff must accomplish service within three years after filing a complaint. Absent an appearance by defendant(s), the court, upon motion or on its own initiative, must dismiss an action without prejudice if the plaintiff fails to do so.

(2) A plaintiff who names a fictitious defendant in the complaint pursuant to section 25-5-103 may, within three years of filing the

original complaint, amend the complaint to substitute a real defendant for the fictitious defendant. The three-year time period set forth in Rule 4(t)(1) begins to run as to the newly identified defendant from the date of the filing of the original complaint.

* * *

RECORD AND 1 BRIEFS.

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In the Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell, and ROBERT M. NELSON,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

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QUESTION PRESENTED

May a state court exercise personal jurisdiction to adjudicate a claim under the Federal Employers' Liability Act over a U.S.-based defendant doing business in the state and at home there without violating the Due Process Clause of the Fourteenth Amendment?

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TABLE OF AUTHORITIES

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Other Authorities

BNSF, Operating Divisions Alignment Map, May 24, 2016, *available at* http://www.bnsf.com/customers/pdf/maps/network-map.pdf 5
BNSF Railway Company, Form 10-K for the Fiscal Year Ended December 31, 2013, submitted to the U.S. Securities and Exchange Commission, *available at* https://www.sec.gov/edgar/searchedgar/companysearch.html 5
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H.R. Rep. No. 80-613 (1947) 32

Montana Commissioner of Political Practices, Lobbyist and Principal Search, 2013-2014 Session, https://app.mt.gov/cgi-bin/camptrack/lobbysearch/lobbySearch.cgi 5

Report to the Rail Service Competition [Council] Regarding Requested Research Concerning the Impact of Paper Barriers on Montana Rail Shippers' Competitiveness (2013), *available at* https://www.mdt.mt.gov/business/rscc/docs/rscc-paper-barrier.pdf.....6, 47

Restatement (Second) of Conflict of Laws (1971).....50

S. Rep. No. 61-432 (1910).....2, 17, 23

U.S. General Accounting Office, Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated (1996), *available at* http://www.gao.gov/products/RCED-96-199 33

STATUTORY PROVISIONS INVOLVED

Section 56 of Title 45, U.S.C., section 1445 of Title 28, U.S.C., section 1 of the Judiciary Act of August 13, 1888, ch. 866, 25 Stat. 434, and section 6 of the Judiciary Act of April 5, 1910, ch. 143, 36 Stat. 291, are reproduced at Appendix 1a-3a, *infra*.

INTRODUCTION

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, provides a federal cause of action to interstate railroad employees injured on the job because of their employers' negligence. In crafting FELA, Congress recognized "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation" of a railroad to bring suit. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Accordingly, since 1910, Congress has permitted railroad workers to bring FELA claims in an expansive set of federal and state jurisdictions beyond those where their employers are headquartered or incorporated, or where the workers' claims arise. Specifically, under 45 U.S.C. § 56, a worker may bring a FELA claim in any jurisdiction where the railroad is "doing business" at the time of suit. For more than a century, federal and state courts alike have adjudicated FELA claims against out-of-state railroads based only on the "doing business" connection required by FELA.

Relying on this established practice, respondents each brought FELA claims against petitioner BNSF Railway Company in state court in Montana, which is adjacent to their home states. The claimants asserted that Montana state courts could exercise personal jurisdiction over BNSF because the company's extensive business operations there constituted "doing business" under FELA and, in any event, were so constant and substantial

as to render BNSF essentially at home in Montana and subject to general jurisdiction there.

BNSF now asks this Court to wipe away a century's worth of case law and established practice to hold that the Montana state courts' exercise of personal jurisdiction violates BNSF's Fourteenth Amendment due process rights under the standard announced in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). In BNSF's view, a worker may bring his FELA claim only where a company is headquartered or incorporated, or where the injury occurs. BNSF's position would eviscerate FELA and defy Congress's intent to "load[] the dice a little in favor of" the worker's choice of forum. *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 707 (1942) (Jackson, J., concurring). It would leave injured rail workers to endure nearly the same injustice they faced when FELA had no forum provision and a worker's only legal remedy was of little utility to a "poor man who" was "injured while in railroad employ." S. Rep. No. 61-432, at 4 (1910). BNSF's attempt to roll back the clock under the guise of due process should be rejected.

STATEMENT

1. In 1908, Congress adopted FELA with the aim of putting "on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (internal quotation marks omitted). This human cost was massive, described by President Harrison as a "peril of life and limb as great as that of a soldier in time of war." *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19 (1904).

FELA established a federal cause of action to compensate railroad workers for injuries resulting from their employers' negligence. *See* 45 U.S.C. § 51. To ensure its constitutionality, FELA "applies to railroads only

'while [they are] engaging in' interstate commerce," and permits suits only for injuries employees sustain while "themselves engaged 'in such commerce.'" *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 160 (2003) (quoting 45 U.S.C. § 51) (emphasis omitted). The statute thus targets an unusually mobile group of workers, many of whom work—and are injured—hundreds of miles from home while employed by an interstate carrier.

FELA overrode many common-law tort standards that were barriers to compensation for injured railroad workers. For example, it "abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract." *Gottshall*, 512 U.S. at 542-43. FELA thus functions as "a broad remedial statute," *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987), and courts give it a "liberal construction" to accomplish Congress's objectives, *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

FELA's focus on employer negligence differs from a no-fault workers' compensation scheme. But in many cases, FELA is railroad workers' closest equivalent to workers' compensation. FELA preempted some state-law remedies otherwise available for injured railroad employees. *See Erie R.R. v. Winfield*, 244 U.S. 170, 174 (1917). And many state workers' compensation laws specifically exclude railroad workers on the assumption that FELA provides them "adequate protection." *Hilton v. S.C. Public Rys. Comm'n*, 502 U.S. 197, 202 (1991).

When FELA was enacted, it did not address the jurisdiction where a worker could bring suit. Instead, a provision of the Judiciary Act provided the applicable general rule: A worker could bring a FELA claim only in

a jurisdiction where the railroad defendant was an "inhabitant," *Kepner*, 314 U.S. at 49, which courts interpreted to mean a railroad's state of incorporation. Congress soon concluded that subjecting employees to the difficulty and expense of litigating in distant forums was inconsistent with FELA's remedial purpose. *Id.* at 49-50.

Accordingly, in 1910, Congress amended FELA to expand workers' choices of where to bring and maintain suits. It added the following language to the section now codified at 45 U.S.C. § 56, which until then consisted only of a two-year statute-of-limitations provision:

> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Act of Apr. 5, 1910, ch. 143, 36 Stat. 291. FELA's broad language regarding the proper forum for a plaintiff's claim was "deliberately chosen to enable the plaintiff ... to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted).

Congress subsequently made minor changes to Section 56, changing the reference from "circuit court" to "district court," extending the statute-of-limitations period to three years, and moving to another part of the Code, 28 U.S.C. § 1445(a), the bar on removing state-court

FELA actions to federal courts. In all other respects, Section 56 stands today as it did in 1910.

2. BNSF is a freight rail carrier that operates in 28 states, including Montana, and two Canadian provinces. J.A. 25.[1] Although BNSF is incorporated in Delaware and has its principal place of business in Fort Worth, Texas, J.A. 24, the company (or its corporate predecessor, Burlington Northern) has been registered to do business and conduct its affairs in Montana since 1970, J.A. 34. It maintains a registered agent in Billings, Montana, *see* Tyrrell Opp. to Mot. To Dismiss, Bremseth Decl., Exh. 4, and has a Montana Division headquartered in Billings, *id.* Exh. 7, at 1. That division, which covers portions of North Dakota, South Dakota, and Idaho as well, is now one of ten nationwide. *See* BNSF, Operating Divisions Alignment Map, May 24, 2016.[2] BNSF also maintains a government affairs office in Montana. Bremseth Decl., Exh. 5, at 6. State records indicate that in the 2013-2014 legislative session, BNSF had four Montana-based lobbyists representing its interests before the state legislature. *See* Montana Commissioner of Political Practices, Lobbyist and Principal Search, 2013-2014 Session.[3]

BNSF has a constant presence in Montana. It owns and operates more than 2,100 miles of rail lines there, and

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[1] For a map of the BNSF rail system as of 2013, see BNSF Railway Company, Form 10-K for the Fiscal Year Ended December 31, 2013, submitted to the U.S. Securities and Exchange Commission 6, available at https://www.sec.gov/edgar/searchedgar/company search.html.

[2] *Available at* http://www.bnsf.com/customers/pdf/maps/network -map.pdf.

[3] *Available at* https://app.mt.gov/cgi-bin/camptrack/lobby search/lobbySearch.cgi (by searching the 2013-2014 session, and identifying "BNSF Railway Company" as the "Principal").

in 2013, BNSF's freight trains logged more than 40 million locomotive miles traversing the state. J.A. 39. Since 2010, it has opened approximately 40 new facilities in the state, Bremseth Decl., Exh. 8, at 2, and its facilities include an economic development office, *id.*, Exh. 7, at 1. BNSF employs more than 2,200 people in Montana. *Id.* BNSF earned more than $1.7 billion in 2013 from its Montana operations. J.A. 37.

BNSF has developed a de facto monopoly over rail shipping in Montana. Its in-state activities dwarf those of Union Pacific, the only other Class I carrier operating in the state,[4] which owns a mere 125 miles of track. Nelson Opp. to Mot. To Dismiss, Fain Aff., Exh. 1. Montana Rail Link (MRL), a domestic carrier in the state, also operates on several hundred miles of tracks but leases those tracks from BNSF. *Id.* Since 1987, MRL has maintained an agreement with BNSF that gives BNSF significant control over MRL's pricing when MRL moves freight off its lines to other carriers. *See* Report to the Rail Service Competition [Council] Regarding Requested Research Concerning the Impact of Paper Barriers on Montana Rail Shippers' Competitiveness 2, 12 (2013) (hereinafter, Paper Barriers Study).[5]

Many BNSF employees "do not have a traditional 'work place' as that term is used in other employment settings." J.A. 30. Their work is "highly transitory," taking them to locations along the "entire BNSF rail system." *Id.* For example, in 2014, BNSF used 50 large "production gangs" staffed by employees whom the

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[4] Class I carriers are those "having annual carrier operating revenues of $250 million or more." 49 C.F.R. § 1201.1-1.

[5] *Available at* https://www.mdt.mt.gov/business/rscc/docs/rscc-paper-barrier.pdf (study requested by a council created by the Montana legislature to promote rail service competition in the state).

company solicited from across BNSF's rail system. *Id.* BNSF's production gangs—which function like mobile assembly lines—work around the country, including in Montana. *Id.*

3. Respondent Kelli Tyrrell is a South Dakota resident and the widow of Brent Tyrrell, a former BNSF employee. J.A. 20. Mr. Tyrrell worked for BNSF in South Dakota, Minnesota, and Iowa. Tyrrell's Opp. to Def.'s Mot. to Dismiss 3. Mr. Tyrrell died of renal cell carcinoma (kidney cancer) caused by exposure to harmful industrial chemicals during his BNSF employment. J.A. 20-21. In 2014, Ms. Tyrrell—as the administrator of Mr. Tyrrell's estate—brought a FELA claim against BNSF in a Montana state court based in Billings, where BNSF's registered agent is located and where venue was proper under state law. Pet. App. 3a, 48a; *see* Mont. Code Ann. 25-2-122.

Respondent Robert Nelson is a North Dakota resident who was employed by BNSF as a fuel truck driver. J.A. 16. While working in Washington State, Mr. Nelson fell and suffered disabling knee injuries when a ballast on which he was standing rolled from under him. J.A. 16, 18. In 2011, Mr. Nelson filed a FELA claim against BNSF in the same state court in which Ms. Tyrrell had brought suit. J.A. 15-17.

BNSF moved to dismiss both suits for lack of personal jurisdiction. Pet. App. 3a-4a. The court in Mr. Nelson's case granted BNSF's motion. *Id.* 40a. It held that under *Daimler*, 134 S. Ct. 746, Montana state courts could not, consistent with due process, exercise personal jurisdiction over BNSF to adjudicate Mr. Nelson's claim. Pet. App. 40a. Acknowledging that the same limit would not apply had Mr. Nelson brought his case in the federal court down the street, the court concluded that the case should have

been brought "in a U.S. District Court in one of the 28 states where [BNSF] does business, or in a State Court" in the plaintiff's home state (North Dakota) or the state where the injury occurred (Washington). *Id.* Mr. Nelson appealed.

In Ms. Tyrrell's case, over which a different judge presided, the court denied the motion to dismiss. *Id.* 47a. It concluded that BNSF is "at home" in Montana and subject to general jurisdiction there, *id.* 63a-64a, and, in any event, that FELA permits Montana state courts to exercise personal jurisdiction over BNSF wherever it is doing business, *id.* 72a-73a. The court certified its order for interlocutory appeal, *id.* 41a-42a, which the Montana Supreme Court permitted and consolidated with Mr. Nelson's appeal, *id.* 2a, 35a.

The Montana Supreme Court held that Mr. Nelson and Ms. Tyrrell were entitled to proceed with their claims because FELA authorizes state courts to exercise personal jurisdiction over BNSF wherever it does business. The Montana court emphasized that this Court has consistently interpreted FELA "to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." *Id.* 8a (citing, *e.g.*, *Miles*, 315 U.S. 698). It was "undisputed" that BNSF meets that standard. *Id.* 13a.

The state supreme court rejected BNSF's argument that exercising personal jurisdiction over it would violate the Fourteenth Amendment's Due Process Clause. The court recognized that *Daimler* held that, for Fourteenth Amendment purposes, "general jurisdiction requires foreign corporations to have affiliations so 'continuous and systematic' as to render them 'at home' in the forum state." *Id.* 12a (quoting *Daimler*, 134 S. Ct. at 749). But it

observed that neither *Daimler* nor any of the other cases on which BNSF relied involved congressional power to authorize state courts to exercise personal jurisdiction over defendants for FELA claims. *Id.* 11a. It declined "to depart from the language of 45 U.S.C. § 56—and from a century of U.S. Supreme Court precedent interpreting it." Pet. App. 15a.

Accordingly, the state supreme court reversed the dismissal of Mr. Nelson's complaint and affirmed the denial of BNSF's motion to dismiss Ms. Tyrrell's complaint. *Id.* 2a-3a. The court's holding made it unnecessary to address plaintiffs' alternative argument that BNSF consented to personal jurisdiction by registering to do business in Montana and maintaining an agent for service of process there. *Id.* 19a n.3.

SUMMARY OF ARGUMENT

I. Two sentences in Section 56 work together to permit state courts to exercise personal jurisdiction over an interstate rail carrier doing business in the state.

A. The first relevant sentence (hereinafter, Sentence One) provides that "an action may be brought" in a federal district where, among other places, a railroad is "doing business." This sentence identifies appropriate court venues *and* authorizes those courts to exercise personal jurisdiction over FELA defendants.

Although BNSF urges this Court to apply a bright-line rule distinguishing venue and personal jurisdiction for purposes of Sentence One, the line dividing the two in 1910, when Section 56's relevant amendments were adopted, was not nearly so clear. Rather, this Court's decisions from that period repeatedly interpreted a provision of the Judiciary Act—which permitted federal-question suits against a corporate defendant only in the state of the defendant's "inhabitation"—to govern

personal jurisdiction, not just venue, in federal courts. Congress pointed to two cases adopting this interpretation as examples of the general rule from which it intended to exempt FELA employees by amending Section 56 in 1910.

Moreover, although Congress frequently authorizes the exercise of personal jurisdiction in federal courts by expressly addressing service of process, it need not address personal jurisdiction in this way. The meaning of a statute providing that suit "may be brought" in a particular court must be derived through the full panoply of interpretative tools—which include text, context, purpose, and legislative history. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619 (1925). Using this approach, numerous federal courts have interpreted federal statutes that do not explicitly use the terms "service of process" or "personal jurisdiction" to authorize federal courts to take personal jurisdiction over defendants or witnesses.

B. Section 56's second relevant sentence (hereinafter, Sentence Two) provides that the "jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56. That sentence confirms that state courts, as well as federal courts, have personal jurisdiction in FELA cases.

Although Sentence Two also confirms the presumptive subject-matter jurisdiction of state courts to adjudicate FELA claims, BNSF is wrong to assert that the term "concurrent" jurisdiction must mean subject-matter jurisdiction and *nothing else*. Some case law at the time of FELA's amendment used the term to refer to personal jurisdiction as well. Moreover, BNSF's attempt to confine Sentence Two's effect to confirming state courts'

preexisting subject-matter jurisdiction over FELA claims would ignore nearly a century of this Court's precedent, which has repeatedly interpreted Section 56's "doing business" language to apply to state courts as well as federal ones.

C. Reading Section 56 as BNSF urges would render largely illusory the "substantial right" that FELA provides to workers "to select [a] forum" for their claims. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949) (per curiam). Under BNSF's position, a worker injured far from home could not even bring suit in his home state, in either state or federal court. For example, Mr. Nelson, a resident of North Dakota, would have to go to Delaware, Texas, or Washington to seek compensation for his work-related injuries, all the while bearing the cost of litigation far from home. Such an outcome cannot be reconciled with statutory language "deliberately chosen to enable the plaintiff ... to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted).

In addition, reading Section 56 as BNSF urges is unnecessary to guard against an imagined onslaught of FELA claims in jurisdictions where the only connection to the claims is that the railroads do business there. For roughly a century, state courts have adjudicated FELA claims under factual circumstances identical in all relevant respects to those at issue in this case, just as Congress anticipated when it amended FELA in 1910. Moreover, in 1947, Congress considered and rejected language to narrow the jurisdictions in which a FELA plaintiff could bring suit, although industry voiced precisely the same concerns about forum-shopping "abuses" as it does today. *Pope v. Atl. Coast Line R.R. Co.*,

345 U.S. 379, 386 (1953). There is every reason to believe that Congress intended to "load[] the dice a little in favor of" workers when it crafted Section 56. *Miles*, 315 U.S. at 707 (Jackson, J., concurring). To the extent that BNSF objects to this established practice, its complaint is best directed to Congress. In the meantime, state courts maintain their power to decline to adjudicate claims brought by out-of-state plaintiffs for out-of-state injuries against defendants neither headquartered nor incorporated in the states, so long as their refusal is based on generally applicable local law. Pet. App. 15a; *see also State of Mo. ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950).

II. The authority provided to a state's courts by Section 56 to exercise personal jurisdiction over companies doing business in the state raises no constitutional concerns. Congress has broad power to permit state courts, as well as federal ones, to exercise personal jurisdiction over U.S.-based defendants to adjudicate federal claims. That congressional power, unlike the power of states to assert their *own* authority over out-of-state defendants, is not constrained by the Fourteenth Amendment's limits on the territorial reach of state authority. Any applicable due process limitations would derive from the Fifth Amendment, but BNSF has waived any personal jurisdiction defense based on that constitutional limitation.

III. Even if this Court were to hold that FELA does not address state-court personal jurisdiction, Montana state courts may nevertheless constitutionally adjudicate the claims in this case because BNSF is "at home" in Montana under this Court's general-jurisdiction jurisprudence. Under *Daimler*, a company's place of incorporation or corporate headquarters is an "exemplar"

of a forum in which a corporation is at home. 134 S. Ct. at 760. However, as *Daimler* recognizes, "a corporation's operations in a forum other than" these exemplar forums "may be so substantial and of such a nature as to render the corporation at home in that State" as well. *Id.* at 761 n.19.

BNSF has integrated itself into Montana's economic and political life just as if it were a local company. BNSF's headquarters for the Montana Division—which spans four states—are located in Montana, and the company has more than 40 facilities and 2,200 employees in the state. BNSF has been registered to do business in the state for decades and has an agent for service of process there. On any given day, BSNF's trains crisscross the state on the company's more than 2,100 miles of permanent tracks, and BNSF represents its interests before the state legislature. BNSF has earned more than $1.7 billion in a single year from its ability to do business in Montana. Under these circumstances, BNSF is "at home" in Montana, and it does not offend traditional notions of substantial justice and fair play to expect BNSF to answer to claims there.

BNSF's operations in Montana vastly exceed the attenuated corporate contacts deemed insufficient to support general jurisdiction in *Daimler*, 134 S. Ct. 746, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). Rather, its contacts are more akin to the circumstances in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), a case in which this Court sustained general jurisdiction in a state outside a company's place of incorporation or principal place of business. Although BNSF would have this Court limit general jurisdiction outside of the

paradigmatic forums of incorporation or principal place of business to situations in which a company adopts a surrogate location for its principal place of business, that limitation is unsupported by *Perkins* or any case interpreting it.

IV. The Montana Supreme Court acknowledged that plaintiffs had argued that the state's courts could exercise personal jurisdiction over BNSF for the additional reason that BNSF consented to jurisdiction. However, the court did not reach the issue. Pet. App. 19a n.3. If this Court does not affirm on a ground addressed above, it should remand to the Montana courts to consider in the first instance plaintiffs' consent argument—which hinges in part on Montana state law.

ARGUMENT

I. FELA Authorizes State Courts To Exercise Personal Jurisdiction Over Railroads Wherever They Do Business.

The Montana Supreme Court correctly interpreted FELA to permit the state's courts to exercise personal jurisdiction over BNSF because the company is doing business in Montana. That reading is supported by FELA's text, structure, and purpose and by decades of this Court's jurisprudence.

A. Section 56's Reference To Where Suit "May Be Brought" Governs Personal Jurisdiction In Federal Courts.

1. As originally enacted in 1908, FELA contained no language governing where claims could be brought. Litigants instead had to rely on a provision of the Judiciary Act, as reenacted and amended, to determine where to bring suit. That provision established the "general rule" that, unless a defendant voluntarily

appeared in federal court, the defendant had to be personally served in the district where the federal court was located to subject the defendant to personal jurisdiction. *Robertson*, 268 U.S. at 622. This rule was "in accordance with the practice at the common law." *Id.*

As adopted by the First Congress, the Judiciary Act of 1789 also made clear that not just any federal district court would do for service of process. Rather, no civil suit could be brought in federal court "against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 79. In the Jurisdiction and Removal Act of 1875, Congress reenacted that provision, with limited amendment, in its substantial overhaul of the federal court system. *Ex parte Schollenberger*, 96 U.S. 369, 375 (1877); *see* Jurisdiction and Removal Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (providing that no civil suit could be brought in federal court "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding").

Twelve years later, however, Congress deleted the reference to the district in which a defendant "shall be found." This deletion was "designed to shut the door against service of process upon a natural person in any place where he might be caught." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 171 (1939). Instead, it provided that where a federal court's subject-matter jurisdiction was based solely on diversity, "suit [could] be brought only in the district of the residence of either the plaintiff or the defend[a]nt." Judiciary Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, corrected by Judiciary Act of

Aug. 13, 1888, ch. 866, § 1, 25 Stat. 434. In contrast, in cases involving a federal question, civil suit could be brought against a defendant "by any original process or proceeding" only in the district where the defendant was an "inhabitant." *Id.*

In 1908, at the time of FELA's enactment, the amended Judiciary Act provision governing where civil suit could be brought addressed both personal jurisdiction and venue in the federal courts, although—as this Court has recognized—those two concepts are distinct. *See Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985) (venue relates to litigants' convenience); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (personal jurisdiction "goes to the court's power to exercise control over the parties"). By 1908, this Court had repeatedly recognized that the provision applies to a federal court's authority to subject a defendant to personal jurisdiction.

For example, in *Macon Grocery Co. v. Atlantic Coast Line Railroad Co.*, 215 U.S. 501 (1910), this Court considered whether a federal court "acquired jurisdiction over the person of the defendants." *Id.* at 505. It concluded that—regardless whether subject-matter jurisdiction was based on a federal question or diversity of citizenship—the corporate defendant could not be "compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant" under Section 1 of the amended Judiciary Act. *Id.* at 510; *see also id.* at 508-09 (describing relevant portion of Section 1). Accordingly, it held that the case should have been dismissed "for want of jurisdiction over the persons of the defendants." *Id.* at 510. Likewise, in *Davidson Bros. Marble Co. v. United States*, 213 U.S. 10 (1909), corporate defendants moved to "set aside the service of the summons..., and to dismiss the said action upon the ground that the said court ha[d] no jurisdiction

of the persons of the defendants." *Id.* at 13. This Court held that the circuit court was "without jurisdiction" over the suit because the defendants were not inhabitants of the state in which suit was brought, as required by the Judiciary Act in federal-question cases. *Id.* at 17; *see also, e.g., In re Keasbey & Mattison Co.*, 160 U.S. 221, 228, 231 (1895).

2. Litigation following FELA's enactment "promptly disclosed what Congress considered deficiencies in" the statute with respect to "the right of railroad employees to bring personal injury actions." *Kepner*, 314 U.S. at 49. Congress was concerned that the Judiciary Act limited FELA plaintiffs to bringing suit in a railroad's place of inhabitation. *Id.* It recognized that forcing a worker to bring suit where a railroad was incorporated could force the worker to travel to "a place in a distant State from the home of the plaintiff," perhaps "a thousand miles or more from the place where the injury was occasioned." S. Rep. No. 61-432, at 4. Congress expressed concern that this requirement would impose on vulnerable workers the "extreme difficulty, if not impossibility," of "securing the attendance of the necessary witnesses at such a distant point," and could "make[] the remedy given by [FELA] of little avail." *Id.*

Both the House and Senate Reports for FELA's 1910 amendment pointed to two cases highlighting the unacceptable limitations of the Judiciary Act for FELA plaintiffs. *See id.*; H.R. Rep. No. 61-513, at 6 (1910); *see also Kepner*, 314 U.S. at 49 & n.6 (discussing this aspect of the legislative history). One was *Macon Grocery*, 215 U.S. at 510, which (as discussed above) held that under the Judiciary Act, a federal-question case should have been dismissed "for want of jurisdiction over the persons of the

defendants" because suit was not brought in the state in which the corporate defendants were inhabitants.

The other was *Cound v. Atchison, Topeka & Santa Fe Railway Co.*, 173 F. 527 (C.C.W.D. Tex. 1909), a FELA case in which a Texas worker injured in New Mexico by a Kansas railroad brought suit in a Texas federal court. *Id.* at 530. As in *Macon Grocery*, the defendant asserted a "plea to the [court's] jurisdiction" on the ground that it was not an inhabitant of Texas. *Id.* at 534. The court determined that because FELA did not then address "whether th[e] court ha[d] jurisdiction," *id.* at 530, "recourse must be had to" the Judiciary Act, *id.* at 532. It therefore dismissed the FELA suit for "want of jurisdiction," *id.* at 534, and remarked that this Court's case law had "definitely and conclusively settled" that "for jurisdictional purposes, a railway corporation [was] a person and inhabitant of the state under the laws of which it [was] incorporated," *id.* at 533.

To avoid the *jurisdictional* dismissals compelled by cases like *Macon Grocery* and *Cound*, Congress added Sentence One to provide that a FELA plaintiff may bring suit "in a [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." This amendment intentionally "provid[ed] an exception" from the Judiciary Act's *jurisdictional* rule that a federal-question suit could be brought only where a defendant was an inhabitant. *Kepner*, 314 U.S. at 50.

BNSF errs in asserting that a bright line separated venue and personal jurisdiction in 1910, when FELA was amended. BNSF's error appears to stem from its mistaken belief that Section 11 of the Judiciary Act of 1789, which permitted service wherever a defendant could

be found, remained in effect at the time of FELA's amendment in 1910 and governed personal jurisdiction in federal courts, Pet'r Br. 30-31, whereas Section 1 of the Judiciary Act of 1888 governed general venue in federal courts at that time, *id.* 6-7. As discussed above, these two provisions did not exist side-by-side when FELA was amended in 1910; rather, Section 11 of the 1789 Act was reenacted in 1875 and amended in the 1880s. The two provisions equally governed both personal jurisdiction and venue in federal courts during the different time periods in which they were in effect.

In sum, the relevant provision of the Judiciary Act was understood to govern both venue and personal jurisdiction in federal courts. Section 56's "exception," enacted to address the jurisdictional limitations of the Judiciary Act, therefore is properly understood to do so as well.

3. BNSF acknowledges (at 31-32) that Congress has broad authority to set rules for the exercise of personal jurisdiction in federal courts. *See, e.g., United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878). It contends, however, that "statutes expanding venue without expanding options for service of process do not affect personal jurisdiction," and that Section 56 is such a statute. Pet'r Br. 33. This purported rule is no rule at all.

Some federal statutes include provisions expressly specifying where process may be served. *See, e.g.*, Securities Exchange Act, 15 U.S.C. § 78aa; ERISA, 29 U.S.C. § 1132(e)(2). And some "basis for [a] defendant's amenability to service" is necessary to support a court's exercise of personal jurisdiction because "[s]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Omni*

Capital, 484 U.S. at 104 (internal quotation marks and alteration omitted). However, this Court has never held that Congress must expressly refer to service of process in a statute to authorize it or—by extension—to permit a court's exercise of personal jurisdiction.

Rather, a statute's meaning must be derived through the full panoply of interpretative methods—text, context, purpose, and legislative history. Even absent an express provision for service, context may indicate Congress's intentions regarding service of process. For example, in *Robertson v. Railroad Labor Board*, this Court asked whether the Transportation Act's authorization of the Railroad Labor Board to "invoke the aid of any United States District Court" to compel a witness's appearance, 268 U.S. at 620 (internal quotation marks omitted), "provide[d] that the process of every District Court shall run into every part of the United States," *id.* at 622. Although the Court ultimately held the statute did not, its conclusion was based on an examination of the statute's purpose and the practical implications of authorizing an advisory board to invoke nationwide service of process. *Id.* at 626-27.

Similarly, in *Omni Capital*, although the Court considered and rejected an argument that a "nationwide service provision for a private action" was implicit in a portion of the Commodity Exchange Act, 484 U.S. at 108, it did so only after carefully reviewing the statute's text and amendment history, *id.* at 104-08. It did not, as the United States suggests (at 12-13), adopt a rule requiring statutes to invoke the terms "service" or "personal jurisdiction" expressly to govern jurisdiction over a defendant.

Traditional tools of statutory interpretation may, in some circumstances, confirm that Congress *did* intend to

authorize service of process and the exercise of personal jurisdiction without expressly saying so. For example, 18 U.S.C. § 1965(a), a portion of RICO, states that any civil RICO action "against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." The weight of authority in recent years holds that this provision "grants personal jurisdiction over an initial defendant in a civil RICO case." *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 71-72 (2d Cir. 1998); *accord FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1099-1100 (D.C. Cir. 2008); *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006). Courts have adopted this view notwithstanding that the provision does not specifically address service of process, while other subsections of 18 U.S.C. § 1965 do. *See, e.g.*, *PT United Can Co.*, 138 F.3d at 72. BNSF is thus incorrect to contend (at 31-32) that RICO is an example of a statute that confers personal jurisdiction only because it expressly "expand[s] the plaintiff's options for service."[6]

This portion of RICO is not the only example of a federal statute that authorizes federal courts to exercise

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[6] Similarly, BNSF dramatically overstates the lower-court authority to support its contention that other statutes addressing venue but silent as to service of process have been held not to govern personal jurisdiction. *See* Pet'r Br. 32-33. *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 855-56 (11th Cir. 1990), and *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1363 (Fed. Cir. 2001), do not even cite the provisions on which BNSF relies—28 U.S.C. § 1400(a) and (b)—much less interpret the scope of those provisions. BNSF does the same (at 32, 38) with respect to statutes that it says address service of process or concurrent subject-matter jurisdiction but have been held not to confer personal jurisdiction in state courts: *Hoffman v. Chandler*, 431 So. 2d 499, 501-02 (Ala. 1983), did not consider an argument that ERISA confers personal jurisdiction on a state court.

personal jurisdiction over a person without explicitly addressing service of process or personal jurisdiction. *See, e.g., U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 250-52 (D.C. Cir. 2005) (holding that the Tariff Act, although "completely silent as to service of process," impliedly authorizes it nationwide because such authorization was necessary "to effectuate the underlying statute's purpose"); *FEC v. Comm. to Elect Lyndon La Rouche*, 613 F.2d 849, 858-62 (D.C. Cir. 1979) (statutory provision granting the Federal Election Commission the power to enforce subpoenas "require[s] an implied grant of authority for extraterritorial service of process to effectuate the purpose of the regulatory scheme"); *FTC v. Browning*, 435 F.2d 96, 99 (D.C. Cir. 1970) (declining to interpret Section 9 of the Federal Trade Commission Act "as simply a venue statute" and instead reading the provision to contain implicit authorization for extraterritorial service of process).

The proper question, then, is whether FELA was intended to ensure that a plaintiff could bring a claim against a railroad in a district court in any state where that railroad is doing business, with service of process in such a state implicitly authorized as being necessary to effectuate that intention. Nothing in Sentence One compels the conclusion that it addresses only venue and *not* also personal jurisdiction. It does not use the term venue. It speaks in terms of where a suit "may be brought" in federal court. Moreover, as discussed above, FELA's structure, legislative record, and purpose demonstrate that Section 56 governs personal jurisdiction, regardless whether some other federal statutes do so more directly.[7]

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[7] The United States attributes special significance to Congress's adoption of the Clayton Act four years after amending FELA in 1910. The Clayton Act addresses both where an action "may be brought"

B. FELA's Reference To State-Court "Jurisdiction" Permits State Courts To Exercise Personal Jurisdiction Over Defendants Doing Business In Their States.

The second relevant sentence of Section 56 (Sentence Two) provides that the "jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." The better reading of Sentence Two is that it both confirms that state courts have subject-matter jurisdiction *and* extends to state courts the authority to exercise personal jurisdiction provided in Sentence One.

One purpose of Sentence Two is to confirm the subject-matter jurisdiction of the state courts to adjudicate FELA claims. Although state courts are "presumptively competent" to adjudicate federal claims, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), a state-court decision issued in 1909 held otherwise with respect to FELA claims. *See Hoxie v. N.Y., New Haven & Hartford R.R. Co.*, 73 A. 754 (Conn. 1909). Section 56 was amended in part to supersede this erroneous decision. *See* S. Rep. No. 61-432, at 5; H.R. Rep. No. 61-513, at 7.

BNSF and the United States wrongly contend that Sentence Two stops there and has no impact on state courts' personal jurisdiction over defendants. The term

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and where process "may be served." U.S. Br. 13 (citing Clayton Act, ch. 323, § 12, 38 Stat. 736, now codified at 15 U.S.C. § 22). However, the interpretation of "a different statute enacted by a different Congress" is of little use. *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1386 (10th Cir. 1990). And as the other statutory examples described at pp. 21-22 demonstrate, Congress has not been consistent over time in the extent to which it expressly invokes "service" when it intends to authorize the exercise of personal jurisdiction.

"jurisdiction" in Section 56 need not have only one meaning: subject-matter jurisdiction. Rather, the term, when modified by neither "subject-matter" nor "personal," may apply to both. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017) (holding that although "court of competent jurisdiction" usually means subject-matter jurisdiction, it may in some cases refer as well to personal jurisdiction); *Intera Corp. v. Henderson*, 428 F.3d 605, 620-21 (6th Cir. 2005) (recognizing that Federal Rule of Civil Procedure 41(b)'s reference to dismissals for "lack of jurisdiction" covers both dismissals for lack of subject-matter and personal jurisdiction).

Nor does the statute's reference to the "concurrent" nature of the jurisdiction rebut that presumption or resolve the ambiguity. BNSF points to various statutes using "concurrent" jurisdiction to refer to subject-matter jurisdiction. Pet'r Br. 38. But the text and structure of some are entirely different. *See, e.g.*, 29 U.S.C. § 1132(e)(1) (ERISA provision allowing for "concurrent jurisdiction of [specified] *actions*" but specifying "exclusive [federal] jurisdiction" of certain other "actions"); 49 U.S.C. § 11501(c) (giving federal district courts "concurrent" jurisdiction "to prevent a [specified statutory] violation" regardless of "the amount in controversy or citizenship of the parties").

Moreover, the fact that some statutes or cases use "concurrent" jurisdiction to refer only to subject-matter jurisdiction hardly establishes that "concurrent" jurisdiction is susceptible to only one meaning here. A term "may mean one thing for one purpose and something different for another." *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933). Some courts, including this Court, have used "concurrent" jurisdiction to refer to jurisdiction over persons, not subject matter. *See Claflin*

v. Houseman, 93 U.S. 130, 136 (1876) ("Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place *and persons*...." (emphasis added)); *Ala. Great S. R.R. Co. v. Fed. Maritime Comm'n*, 379 F.2d 100, 102 (D.C. Cir. 1967) (per curiam) (Shipping Act "does not preclude concurrent jurisdiction over the same 'persons'"). In light of this ambiguity and FELA's remedial purpose, Sentence Two should be liberally construed to accomplish Congress's objective, *Buell*, 480 U.S. at 561, of permitting FELA plaintiffs a broad range of jurisdictions in which to bring their suits.

The United States (at 11) attributes special significance to Sentence Two's focus on the "jurisdiction of the courts of the United States *under this chapter*," which is "concurrent with that of the courts of the several States." (Emphasis added.) It contends that Congress's use of "under this chapter" indicates that "both state and federal courts have jurisdiction over a particular type of action," not jurisdiction over a defendant. The term may help confirm concurrent subject-matter jurisdiction. However, because "under this chapter" modifies only the "jurisdiction of the courts of the United States," it also supports the conclusion that elsewhere—that is, in Sentence One—FELA does in fact confer *new* jurisdiction on federal courts, not just venue.

Further, the structure of Section 56 supports reading Sentence Two as extending to state courts the personal jurisdiction granted federal courts by Sentence One. When Congress amended FELA in 1910, it added Sentences One and Two as a single paragraph within the same section, indicating that it intended them to work as a package. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (holding that two portions of a statutory

section must be "read together" and "with a view to their place in the overall statutory scheme"); *see also Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law...." (internal quotation marks omitted)). Sentence Two, as adopted in 1910, also included an unusual clause forbidding removal to federal court of a federal cause of action filed in state court. The language reinforces the conclusion that Congress intended to confer on workers a cohesive right to "find the corporation at any point or place *or State* where it is actually carrying on business, and there lodge his [FELA] action." *Kepner*, 314 U.S. at 50 (emphasis added) (internal quotation marks omitted).

C. This Court's Case Law Supports The Montana Supreme Court's Reading Of Section 56.

1. This Court's precedent confirms that Section 56 permits state courts to exercise personal jurisdiction over defendants doing business within their jurisdiction.

In *Miles*, for example, a Tennessee resident brought a FELA claim in Missouri state court for injuries sustained in Tennessee. 315 U.S. at 699. Holding that the Tennessee court could not enjoin the Missouri court from adjudicating the claim on grounds of inequity or harassment, this Court emphasized—mirroring the language of Sentence One—that "[t]he permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business." *Id.* at 705. The Court concluded that such suits could not be "burdensome" when "suits in federal district courts at those [same] points do not unduly burden interstate commerce." *Id. Miles* thus reflects this Court's clear understanding that Section 56's "doing business" language applies to federal *and* state courts. *See also id.*

at 706-07 (Jackson, J., concurring) (concluding that "the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal *or a state court* of which to ask his remedy" (emphasis added)).

Similarly, in *Kepner*, this Court held that an Ohio state court could not, on grounds of "inequity based on cost, inconvenience or harassment," 314 U.S. at 54, "validly exercise its equitable jurisdiction to enjoin" an Ohio resident from prosecuting a FELA claim based on an Ohio injury in a federal court of New York, where the defendant did business, *id.* at 47. *Kepner* confirmed the broad range of *federal* courts in which suit could be brought by reciting the legislative record, *see supra* pp. 17-18, that demonstrates FELA was intended as an exception to a more general provision in the Judiciary Act governing personal jurisdiction in federal courts, *see* 314 U.S. at 49-50.[8] In that same discussion, *Kepner* recognized that FELA's language was "deliberately chosen to enable the plaintiff ... to find the corporation at any point or place *or State* where it is actually carrying on business, and there lodge his action." *Id.* at 50 (emphasis added) (internal quotation marks omitted). *Kepner* thus lends further support to the application of Section 56 to state courts' personal jurisdiction.

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[8] *Kepner*'s reference to Section 56 as a provision "'establish[ing] venue' in *federal* cases," Pet'r Br. 29 (quoting *Kepner*, 314 U.S. at 52) (emphasis added), is neither surprising—since the case involved an attempt to enjoin a FELA claim in *federal court*—nor contrary to respondents' position that *for federal courts* Section 56 establishes both venue and personal jurisdiction. Contrary to BNSF's assertion, *Kepner* contain no language "explain[ing] that Section 56 does not confer personal jurisdiction." Pet'r Br. 29.

BNSF waves off these and other of this Court's cases on the ground that they offer no more than drive-by jurisdictional rulings and should be disregarded because they generally arose before *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which initiated the Court's modern due-process analysis. *See* Pet'r Br. 34. However, it bears emphasis just how many FELA cases this Court reviewed from state and federal court judgments involving out-of-state plaintiffs and defendants and injuries that were not alleged to have occurred in the state. *See, e.g.*, *Mayfield*, 340 U.S. 1; *Miles*, 315 U.S. 698; *Kepner*, 314 U.S. 44; *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934); *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932). The established practice since FELA's earliest days, which these cases demonstrate, provides a good indicator of how courts, workers, and railroads alike traditionally understood FELA.

International Shoe did nothing to alter the traditional understanding that Section 56 provides for personal jurisdiction in federal and state courts. For example, the Second Circuit's post-*International Shoe* decision in *Kilpatrick v. Texas & Pacific Railway Co.*, 166 F.2d 788 (2d Cir. 1948) (L. Hand, J.), relied on *Miles* and *Kepner* to hold that "once a railroad '[does] business' in any jurisdiction," Section 56 "subject[s] it to personal service" in that jurisdiction's courts. *Id.* at 790. It recognized that the "doing business" standard under Section 56 diverged from the test for state-court specific personal jurisdiction under *International Shoe*. *Id.*; *see also Kilpatrick v. Texas & P. Ry. Co.*, 337 U.S. 75, 76 (1949) (acknowledging that an earlier court of appeals decision had "held that the railroad was subject to service in New York" under FELA).

And in 1953, also after *International Shoe*, this Court held in *Pope*, 345 U.S. 379, that the federal transfer statute, 28 U.S.C. § 1404(a), did not abrogate *Kepner*'s holding barring a state court from enjoining on grounds of inequity a FELA claim brought by one of its citizens in another jurisdiction. The plaintiff in *Pope* resided in Georgia and was injured there but had instead brought his claim in an Alabama state court. 345 U.S. at 380-81. This Court emphasized that Section 56 "establish[ed] [the plaintiff's] right to sue in Alabama" by providing "that the employee may bring his suit wherever the carrier 'shall be doing business,'" and the carrier "admittedly [did] business in Jefferson County, Alabama." *Id.* at 383. This Court therefore held that Georgia courts could not exercise their traditional equitable power to prevent the plaintiff from bringing suit there. *Id. Pope* necessarily held that Section 56 provides a worker a right to sue, in state courts as well as federal ones, wherever a railroad is doing business.

2. To be sure, this Court has never held that a state court *must* exercise the personal jurisdiction that FELA authorizes, where generally applicable local law would forbid it. Many of the cases on which BNSF and the United States rely may be distinguished on this ground.

Mayfield, for example, holds that a state court may rely on its forum non conveniens statute to decline to hear FELA claims so long as the declination does not discriminate against that species of claim. 340 U.S. at 4-5. BNSF points (at 35) to *Mayfield*'s assumption in dictum that a state must have "acquired jurisdiction over the defendant" to adjudicate a FELA claim. *Id.* at 3. But that observation in context refers to the limitations of a state's local law, not FELA. *See Haywood v. Drown*, 556 U.S. 729, 738 (2009) (describing *Mayfield* and other FELA

decisions as permitting state courts to decline to adjudicate FELA claims based on a "state rule" that "treated state and federal claims equally").

BNSF also places much stock in statements in *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1 (1912) (*Second Employers' Liability Cases*), that FELA "'may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.'" Pet'r Br. 39 (quoting *Second Employers' Liability Cases*, 223 U.S. at 59). But this Court in *Second Employers' Liability Cases* explained precisely what it meant by that statement, which concerned the subject-matter jurisdiction of the state court involved in the case and had nothing to do with personal jurisdiction: "We say 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,' because ... the superior courts of [Connecticut] are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction" in cases under the laws of Connecticut and other states. *Id.* at 57. Thus, this Court's reference to "jurisdiction" clarified that specialized state courts that lack general subject-matter jurisdiction under the state's judicial scheme need not hear FELA claims.[9] It was likewise in this context that *Second Employers' Liability Cases* stated that FELA was not intended "to

[9] For the same reason, BNSF's attempt to cast FELA's removal provision as evidence of Congress's intent to place a federal-law constraint on FELA's jurisdictional grant is unavailing. Pet'r Br. 39. In context, the provision's reference to a state court of "competent jurisdiction" merely confirms that FELA leaves states free to maintain voluntary constraints on *their own* subject-matter jurisdiction within the state judicial system.

enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Id.* at 56.

The decision below is consistent with these opinions, however they may be read. The Montana Supreme Court concluded that the exercise of personal jurisdiction over BNSF here was permitted by FELA *and* consistent with Montana law. *See* Pet. App. 15a, 19a.

3. This Court's holding that Section 56 confers a "substantial right" to bring suit in state court further supports the Montana Supreme Court's reading of Section 56. In *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949) (per curiam), the Court addressed the scope of another FELA provision that provided then, as it does now, that a contract that "enable[s] any common carrier to exempt itself from any liability created by" FELA "shall to that extent be void." *Id.* at 266; 45 U.S.C. § 55. An injured worker had contractually agreed with his employer that if he later filed a FELA suit, he would do so in the place where he was injured or where he resided, that is, "either the Circuit Court of Calhoun County, Michigan, or the United States District Court for the Eastern District of Michigan." *Boyd*, 338 U.S. at 264. Instead, the worker brought suit in state court in Illinois, *id.*, a jurisdiction where the railroad was doing business. *See Boyd v. Grand Trunk W. R.R. Co.*, Pet'r Br. at 14, 1949 WL 50308 (U.S. 1949).

This Court held the contract void on the ground that the worker's "right to select the forum granted in" Section 56 was a "substantial right" that could not be contractually waived. *Boyd*, 338 U.S. at 266. It quoted both the first and second sentences of FELA—those regarding where an action "may be brought" in federal court and addressing the "jurisdiction" of state courts—and did not question the view that the employer was "liable to suit in Cook

County, Illinois, in accordance with *this* provision" as a whole. *Id.* at 265 (emphasis added). *Boyd* thus supports reading Section 56 to go beyond providing for the convenience of the parties (as in venue) or reaffirming a state court's preexisting subject-matter jurisdiction over FELA claims.

D. BNSF's Reading Of Section 56 Would Harm Injured Workers And Is Unnecessary To Protect State Courts and Defendants.

1. BNSF attempts to paint respondents as engaged in nefarious forum-shopping that harms state courts and defendants. However, the suggestion that injured railroad workers, as a matter of course, scour the nation for hospitable forums in which to bring suit is divorced from reality. In general, injured workers or their individual survivors who bring suit under FELA will be far more burdened by litigating in a forum far from their homes than interstate transportation companies already doing business in that forum have been throughout the last century.

In any event, Congress intended through Section 56 to give plaintiffs an unusually broad right with respect to where to bring suit. And in 1947, Congress declined to narrow the set of jurisdictions in which a plaintiff could bring suit under Section 56. It did so even in the face of evidence that between 1941 and 1946, "employees of 51 railroads" filed "2,512 suits, in remote jurisdictions rather than in the district where the accident took place or the plaintiff lived" and that "[m]ore than 92 percent of all these imported suits were filed in five States: Illinois, California, New York, Minnesota, and Missouri." H.R. Rep. No. 80-613, at 3 (1947). In short, BNSF's cries of foul over forum-shopping are nothing new, and to the extent

that they reflect an outcome BNSF finds undesirable, they are more appropriately directed at Congress.

The long history of FELA claims brought in states where the only connection is that the railroad does business there also casts doubt on BNSF's contention that state courts will be flooded with FELA suits under the Montana Supreme Court's decision. *See supra* p. 28 (citing cases). To the contrary, courts are likely to see exactly the same flow they have experienced to date. In any event, if state courts believe that they are inundated by unwelcome, out-of-state claims, they may deny access to individuals bringing those claims so long as "in similar cases the State for reasons of local policy," such as venue or forum non conveniens statutes, "denies resort to its courts and enforces its policy impartially." *Mayfield*, 340 U.S. at 4; *see Herb v. Pitcairn*, 324 U.S. 117, 123 (1945); *Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377, 387-88 (1929).

BNSF is, therefore, incorrect (at 46-47) that under the Montana Supreme Court's interpretation of Section 56, railroads could be sued "in any county in any state where they operate, even if the railroad does no business in that county." For example, here, BNSF *does* do business in the county where it was sued, and Montana requires non-residents bringing out-of-state tort suits against corporations incorporated in other states to bring their claims in the Montana county where the corporation's registered agent is located. *See* Mont. Code Ann. 25-2-122(2); *see also* U.S. General Accounting Office, Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated 33 (1996), *available at* http://www.gao.gov/products/RCED-96-199 (finding that many states apply their forum non conveniens statutes to FELA claims).

This Court need not save the Montana state courts or those of any other state from a "problem" that the states can address on their own if they see fit.

2. BNSF's cure for the purported forum-shopping problem that it identifies goes far beyond the supposed illness and would severely impair workers' ability to bring their claims. If BNSF were correct that Section 56 does not address *any* court's authority to exercise personal jurisdiction, then even railroad workers who reside in Montana and seek to bring suit in their home-state federal court would be locked out of court there unless the accident occurred in the state or they could otherwise show sufficient minimum contacts to justify the exercise of specific jurisdiction.

Specifically, a federal court's personal jurisdiction over a defendant is now governed by Federal Rule of Civil Procedure 4, which provides that a federal court generally relies on the state long-arm statute of the state in which it sits. *See* Fed. R. Civ. P. 4(k)(1)(A); *see also Daimler*, 134 S. Ct. at 753. Rule 4 also provides that service of summons may establish personal jurisdiction over a defendant "when authorized by a federal statute." Fed. R. Civ. P. 4(k)(1)(C). Under BNSF's view of FELA, and of the Fourteenth Amendment's limitations on state long-arm statutes, neither of these Rule 4 bases could justify the exercise of personal jurisdiction over BNSF in Montana. For example, BNSF's theories would direct Mr. Nelson—a North Dakota resident—to go to Washington, Texas, or Delaware to seek the compensation to which he is entitled under FELA.

The United States attempts to avoid the harshness of its position by leaving open the possibility that a state court *might* "exercise personal jurisdiction over a railroad if the State was the employee's place of residence and

principal place of work in his ongoing employment relationship with the railroad, based on a work-related injury incurred while the employee was on assignment out of the State." U.S. Br. 29 n.9. This narrow possibility is not a substitute for permitting an injured worker to "find the corporation at any point or place or State where it is actually carrying on business, and there lodge his [FELA] action." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted).

II. FELA's Conferral Of Authority On State Courts To Exercise Personal Jurisdiction Is Consistent With Due Process Limitations.

Absent a defendant's consent, or the defendant's having been personally served while present in the forum state, a state court may not on its own authority—consistent with the Fourteenth Amendment—exercise personal jurisdiction over the defendant unless the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted). With respect to the nature of these "minimum contacts" for corporate defendants, this Court has "differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear*, 564 U.S. at 919. A court may subject a corporate defendant to its "specific jurisdiction" if "a suit aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). Where a suit does not arise from or relate to these contacts, a state court may exercise its "general jurisdiction" so long as the corporate defendant's affiliations with the forum state "are so constant and pervasive as to render it essentially at home"

there. *Daimler*, 134 S. Ct. at 751 (internal quotation marks and alteration omitted).

BNSF argues that if FELA permitted state courts to exercise personal jurisdiction over a railroad defendant anywhere it does business, the statute would violate the Fourteenth Amendment's limitation on the exercise of general jurisdiction and thus should be interpreted to avoid this constitutional concern. Pet'r Br. 48. In BNSF's view, Congress may not authorize states to do what they are constitutionally unable to do on their own accord. However, any due process limitations that apply to Congress's jurisdictional choices stem not from the Fourteenth Amendment, but from the Fifth Amendment as it applies to exercises of federal authority.

A. This Court has not addressed whether Congress may confer on state courts the authority to exercise personal jurisdiction over defendants for the adjudication of federal claims when the state could not do so alone. Many cases instead address whether a state court, on its own accord, may exercise personal jurisdiction over out-of-state defendants. *See Goodyear*, 564 U.S. 915; *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality op.); *Helicopteros*, 466 U.S. 408; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Int'l Shoe*, 326 U.S. 310. Restrictions on personal jurisdiction in this context "are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Personal jurisdiction "is in the first instance a question of authority rather than fairness." *Nicastro*, 564 U.S. at 883 (plurality op.).

Even where this Court's personal jurisdiction cases have arisen from federal court actions, questions of Fourteenth Amendment limits on state authority have

been decisive because, under Rule 4, a federal court (with few exceptions) is subject to the same limits on personal jurisdiction as a court of the state in which it sits absent a federal statute authorizing the exercise of personal jurisdiction. *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985); *Daimler*, 134 S. Ct. at 753.

In *Nicastro*, however, a plurality of this Court suggested that Congress could exercise its power to confer personal jurisdiction on state courts in a manner similar to the approach used in FELA. *Nicastro* held that a state court lacked specific jurisdiction over a foreign corporation to adjudicate a state products liability suit where the corporation did not have sufficient contacts with the state. 564 U.S. at 877. The plurality opinion nevertheless stated that if Congress "were otherwise empowered to legislate on the subject," it might be able to "authorize the exercise of jurisdiction in appropriate courts." *Id.* at 885. Absent such a statute, however, the plurality found it "neither necessary nor appropriate" to decide that question. *Id.* Later in the same paragraph, the plurality stated that it was similarly not "necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey." *Id.* at 885-86. Contrary to BNSF's reading of this passage (at 50-51), the juxtaposition of the reference to a single "federal court in New Jersey" and the previous reference to Congress's power to authorize personal jurisdiction in "appropriate courts" indicates that the latter statement potentially encompassed state courts whose authority to exercise personal jurisdiction might be governed by federal legislation as well.

B. BNSF contends that FELA cannot override the Fourteenth Amendment's protections for defendants in

state court because, as recognized in *Nicastro*, "'personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.'" Pet'r Br. 51 (quoting *Nicastro*, 564 U.S. at 884 (plurality op.)). That observation simply begs the question: Which sovereign matters in a case like this one? As BNSF recognizes, the United States is a sovereign separate from the states. *Id.* And because it is the sovereign responsible for authorizing the exercise of personal jurisdiction under FELA, the Fourteenth Amendment's limitations have no application here.

Even if this Court were to view the personal jurisdiction analysis as involving a hybrid of federal (legislative) and state (judicial) power, Section 56 would still be constitutional. Whether a state may exercise power that would be constitutionally impermissible, but for authority conferred by Congress, depends on the specific constitutional prohibition at issue. For example, Congress may "certainly" exercise its power under the Commerce Clause to "authorize state regulations that burden or discriminate against interstate commerce," even though such state regulation would otherwise be prohibited by the dormant Commerce Clause. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *see also Int'l Shoe*, 326 U.S. at 315 ("It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.").

A recognition that Congress may authorize states to exercise personal jurisdiction in federal-question cases like this one would be consistent with the purposes of the Fourteenth Amendment's Due Process Clause, which in this context works to ensure that "States through their courts[] do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal

system." *World-Wide Volkswagen*, 444 U.S. at 292. Where Congress supplies authority to exercise personal jurisdiction, there is no concern about state power grabs, just as federal authorization of state regulation of commerce resolves any concerns about state hostility toward interstate commerce. *Cf. Second Employers' Liability Cases*, 223 U.S. at 57 ("When Congress, in the exertion of the power confided to it by the Constitution, adopted [FELA], it spoke for all the people and all the states, and thereby established a policy for all.").

BNSF contends that if FELA confers on state courts the authority to exercise personal jurisdiction in this case, the federal government could authorize states to discriminate against women, refuse to recognize same-sex marriages performed in other states, impinge on individuals' right to travel, or deny individuals notice and a right to a hearing before deprivation of property or liberty. Pet'r Br. 48-50. Not so: Congress could not take these actions consistent with its own constitutional obligations under the Fifth Amendment. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (recognizing that "equal protection obligations" under the Fifth and Fourteenth Amendments are usually "indistinguishable"); *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (holding that a District of Columbia welfare rule that impinged on new residents' right to travel violated the Fifth Amendment). It thus necessarily could not authorize states to do so. In this case, BNSF does not dispute that Congress *could* provide for the exercise of personal jurisdiction to adjudicate FELA claims in a Montana federal court, only that it has done so.

BNSF's reliance on *Graham v. Richardson*, 403 U.S. 365 (1971), is misplaced for the same reason. *Graham* held that state statutes denying welfare benefits to resident aliens violated the Equal Protection Clause. *Id.* at 376. *Graham* rejected the contention that the discriminatory state statutes were permissible because they were authorized by federal law, instead determining that federal law did not permit such discrimination. *Id.* at 381-83. In so doing, *Graham* remarked that a federal law that "permit[ted] state legislatures to adopt divergent laws on the subject of citizenship requirements" might violate Congress's constitutional obligation to "establish an uniform Rule of Naturalization." *Id.* at 382 (quoting U.S. Const., art. I, § 8, cl. 4).

Graham thus "stand[s] for the broad principle that state regulation *not* congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens *not contemplated by Congress*." *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982) (emphasis added) (internal quotation marks and footnote omitted). Subsequent appellate decisions have therefore upheld state regulations based on alienage that would be constitutionally impermissible under the Fourteenth Amendment but for their effectuation of federal policy lawfully adopted by Congress. *See, e.g.*, *Korab v. Fink*, 797 F.3d 572, 583 (9th Cir. 2014) ("The constitutional question before us is not whether Congress may authorize Hawai'i to violate the Equal Protection Clause but rather what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens...." (internal quotation marks omitted)).

BNSF is similarly wrong to contend that the Fourteenth Amendment's Due Process Clause must be

treated like other prohibitions on state conduct that cannot be overridden by congressional approval—such as the prohibition on entering into treaties or on impairing the obligation of contracts. Pet'r Br. 53-54 (citing, *e.g.*, *White v. Hart*, 80 U.S. 646 (1871)). BNSF relies heavily on prohibitions on state authority that arise from the first clause of Article I, Section 10, of the U.S. Constitution. That clause identifies what "[n]o State shall" do and is immediately followed by two additional clauses that specify what "[n]o State shall" do "without the Consent of the Congress." U.S. Const., art. I, § 10, cls. 1-3. BNSF cites no authority for the proposition that the Fourteenth Amendment, which contains no such juxtaposition of provisions concerning congressional consent, must be interpreted as if it explicitly prohibits congressional authorization of action that the Amendment otherwise forbids solely because of the implicit limits it places on the scope of state territorial authority.

C. To the extent that due-process limitations apply to FELA's authorization of the exercise of personal jurisdiction, those limitations stem not from the Fourteenth Amendment, but the Fifth Amendment to the U.S. Constitution. This Court has repeatedly reserved the question of how Fifth Amendment due process principles may apply to federal laws conferring personal jurisdiction. *See Nicastro*, 564 U.S. at 885 (plurality op.); *Omni Capital*, 484 U.S. at 102 n.5; *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (1987).

The Court should do so here as well because BNSF did not raise a Fifth Amendment due-process defense below, and the Montana Supreme Court therefore did not consider such an argument. Moreover, BNSF's question presented in this Court referred only to the application of "this Court's decision in *Daimler AG v. Bauman*"—a

Fourteenth Amendment decision—in a FELA suit. BNSF never complied with Supreme Court Rule 29.4(b) or suggested in any other manner, including in its opening brief, *see* Pet'r Br. 33 n.4, that it is challenging FELA's constitutionality under the Fifth Amendment.

III. Regardless Of FELA, Montana Courts May Exercise General Jurisdiction Over BNSF Because It Is At Home In Montana.

Even if this Court were to conclude that FELA does not itself authorize service on BNSF for state-court suits, the Montana Supreme Court held that Montana's long-arm rule does, Pet. App. 15a-19a, a conclusion that BNSF does not challenge. Thus, so long as BNSF has constitutionally sufficient contacts with Montana, *see Omni Capital*, 484 U.S. at 104, it may be required to answer the FELA claims in this case. Consistent with the Fourteenth Amendment, a state court may assert general jurisdiction over a corporate defendant where the company's connections to the state are sufficiently "continuous and systematic as to render" it "essentially at home" there. *Daimler*, 134 S. Ct. at 761 (internal quotations marks omitted). BNSF's Montana contacts meet this standard.

A. Since *International Shoe*, which initiated the Court's modern due-process analysis of personal jurisdiction, this Court has addressed the scope of a court's general jurisdiction over a corporation on only four occasions. Together, those decisions establish that discontinuous, insubstantial, or merely transactional ties to a state are insufficient to justify general jurisdiction. A corporation's substantial, ongoing *presence* in a state, however, can subject it to general jurisdiction in the state's courts. The paradigmatic instances of such presence are when a company is incorporated in or has its

principal place of business in a state, but the Court has made clear that those are not the only circumstances in which a corporation's presence may be extensive enough to subject it to general jurisdiction.

The first of this Court's post-*International Shoe* general-jurisdiction decisions was *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, which considered whether Ohio courts could exercise general jurisdiction over a foreign mining company. During World War II, the company's mining operations had been suspended, and the company's president, who also served as the general manager, returned to his Ohio home, where the plaintiff attempted to serve process on the company during this period. *Id.* at 447. This Court began by examining the company president's activities in Ohio. There, he carried on correspondence related to the business, maintained office files, drew checks for his salary and those of two company secretaries also working in Ohio, held occasional directors' meetings, and relied on local banks. *Id.* at 448. However, he had not secured a business license in Ohio or identified an agent for service of process, *id.* at 439 n.2, and the company did not own or operate any mining properties there, *id.* at 448. The Court ultimately concluded that the exercise of personal jurisdiction would not offend due process because many of the company's "wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons." *Id.*

More than three decades later, in *Helicopteros*, the Court considered whether a Texas state court could exercise general jurisdiction over a company, Helicol, that was incorporated in Colombia and had its principal place of business there. 466 U.S. at 409. Survivors and representatives of individuals who were killed when one of

Helicol's helicopters crashed in Peru sued Helicol in Texas. *Id.* at 409-10. Again, this Court examined the defendant's contacts with the forum state but, this time, found them wanting:

> Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no records in Texas and has no shareholders in that State.

Id. at 411. *Helicopteros* rejected the contention that one-time meetings in Texas, brief visits by staff there, and purchases from the state were sufficient to support general jurisdiction. *Id.* at 416.

More than two decades would again pass before this Court revisited its general-jurisdiction jurisprudence in *Goodyear*, 564 U.S. 915. The claims in *Goodyear* arose from a bus accident near Paris allegedly caused by a defective Goodyear tire manufactured by a foreign subsidiary of Goodyear USA. *Id.* at 918. Survivors of children killed in the accident sued Goodyear USA and several foreign subsidiaries in North Carolina state court, where Goodyear USA (but not the subsidiaries) was registered to do business and had plants. *Id.* Goodyear USA did not contest jurisdiction. *Id.* at 921.

This Court held that the foreign subsidiaries could not be haled into North Carolina state court, explaining:

> [The foreign subsidiaries] are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.

Id. The Court rejected the assertion that general jurisdiction over the subsidiaries in North Carolina was warranted because the subsidiaries had placed their tires into the "stream of commerce," and some of those tires (but not the tires involved in the accident) had reached North Carolina through the distribution activities of other Goodyear USA affiliates. *Id.* at 921, 926. It concluded that the "sporadic[]" tire sales made in North Carolina were too attenuated to justify general jurisdiction and likened them to the purchases deemed insufficient in *Helicopteros*. *Id.* at 929.

Daimler, this Court's most recent decision in the area, involved claims by residents of Argentina against Daimler AG, a German car company, for the role that its subsidiary in Argentina played in that country's "Dirty War." 134 S. Ct. at 750-51. The complaint alleged that the subsidiary "collaborated with state security forces to kidnap, detain, torture, and kill" the plaintiffs or related persons. *Id.* at 751. The plaintiffs brought suit in a California federal court, whose authority to exercise personal jurisdiction under Rule 4(k)(1)(A) was coextensive with that of a California court. *Id.* at 753. This Court rejected plaintiffs' contention that California courts could exercise general jurisdiction over Daimler AG because it also had a U.S. subsidiary that, although neither incorporated nor principally based in California,

maintained multiple California facilities and distributed cars to independent dealerships in the state. *Id.* at 751-52. The Court assumed that the U.S. subsidiary was at home in California, and that the subsidiary's California contacts could be imputed to Daimler AG. *Id.* at 760. But it held that Daimler AG's contacts were insufficient to support the exercise of personal jurisdiction by California courts, where Daimler AG's California activities accounted for only 2.4 percent of Daimler's global sales. *Id.* at 752, 760.

Daimler did not foreclose general jurisdiction in a case like this one. *Daimler* rejected the view "that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business"; rather, those places are merely "exemplar bases" of general jurisdiction. *Id.* at 760. Moreover, although *Daimler* clarified that the general jurisdiction inquiry considers a corporate defendant's forum-state contacts in relation to its business "activities in their entirety, nationwide and worldwide," the inquiry continues to focus "on the *magnitude* of the defendant's in-state contacts," *id.* at 762 n.20 (emphasis added) (internal quotation marks and alteration omitted), as well as their "nature," *id.* at 761 n.19. *Daimler* held that a corporation must do something more than "engage[] in a substantial, continuous, and systematic course of business" touching a state, *id.* at 761, but its particular facts "present[ed] no occasion to explore" the precise outer contours of general jurisdiction, *id.* at 761 n.19.

Daimler also reaffirmed in full this Court's post-*International Shoe* decisions on general jurisdiction, including *Perkins*. Accordingly, whether a company is registered to do business, has an agent for service of process, maintains records and offices, employs workers, owns or operates physical facilities, and provides services

in a state remain relevant considerations in the general jurisdiction inquiry.

B. Under this Court's case law, BNSF is at home in Montana and subject to general jurisdiction there because it is akin to a local business. BNSF has established a permanent corporate infrastructure in the state. It maintains an agent for service of process in Montana, and, for nearly five decades, it has been registered to do business there. In this respect, BNSF stands in sharp contrast to the defendants in *Helicopteros* and *Goodyear*, and—for that matter—even *Perkins*, who had not registered to do business in the forum states. Moreover, Montana is among the states in which BNSF maintains one of its division headquarters. *See* Bremseth Decl., Exh. 7, at 1; *see also* BNSF, Map of BNSF Divisions, May 24, 2016.

BNSF's physical presence in Montana is comparable to—in fact, exceeds—that of local businesses. It has a de facto monopoly in the state over rail shipping, dwarfing the presence of the only other Class I carrier in the state and exercising significant control over Montana Rail Link, a domestic rail carrier there. *See* Fain Aff., Exh. 1; Paper Barriers Study 2, 12. It employs more than 2,200 workers in Montana. Bremseth Decl., Exh. 7, at 1. BNSF's trains logged more than 40 million locomotive miles in 2013. J.A. 39. And it earned more than $1.7 billion in revenues in 2013 from Montana operations. J.A. 37. Its contacts in this respect far exceed regular purchases from and occasional visits to a forum state, *see Helicopteros*, 466 U.S. at 416, or "sporadic" product sales reaching a forum state by way of the stream of commerce, *Goodyear*, 564 U.S. at 929.

In addition, BNSF's close, ongoing political relationship with Montana bespeaks an insider status. The company has established a government affairs office

there. Bremseth Decl., Exh. 5, at 6. And in 2013, it relied on four Montana-based lobbyists to represent its interests before the Montana state legislature. *See* Montana Comm'r of Political Practices, Lobbyist and Principal Search.

The United States is incorrect to contend (at 30-31) that BNSF's contacts with Montana are comparable to those held insufficient to support general jurisdiction in *Daimler*. The contacts here are based on the presence of BNSF itself, not a subsidiary, in Montana. In *Daimler*, even assuming that the California contacts of the U.S.-based subsidiary were imputed to the parent Daimler AG, the nature of those contacts became increasingly attenuated up the corporate chain. Daimler AG had no employees, property, or business of its own in California. In this regard, BNSF is more analogous to the U.S. subsidiary in *Daimler* that the Court assumed to be at home in California on the basis of the same contacts attributed to its corporate parent. In addition, there was no indication in *Daimler* that Daimler AG or even its U.S. subsidiary had inserted itself into the political processes of California. In contrast, BNSF has operated in Montana for decades and has become an active participant in Montana political decisions.

The magnitude of forum-state contacts is also greater in this case than it was in *Daimler*. For example, while Daimler AG's in-forum activities generated only 2.4 percent of the company's worldwide sales, 134 S. Ct. at 766-67 (Sotomayor, J., concurring), here BNSF's Montana earnings—$1.7 billion in 2013—are closer to 10 percent of total revenue, J.A. 27, 37. And whereas the U.S. subsidiary in *Daimler* had some facilities in California, 134 S. Ct. at 767, BNSF operates more than 40 of them in Montana. Importantly, BNSF owns more than 2,100 miles

of permanent railroad tracks in Montana, J.A. 39, enough to cover the entire length of the state nearly four times. *Cf. Barrett v. Union Pac. R.R. Co.*, __P.3d__, 361 Or. 115, 139-40 (2017) (en banc) (Walters, J., dissenting) (explaining why an interstate railroad's "permanent, physical presence" in a state "is, by its nature, unique" and thus justifies the exercise of general jurisdiction under *Daimler*).

BNSF wrongly states (at 24) that *Daimler* stands for the proposition that a forum state in which a company is neither incorporated nor has its principal place of business must serve as a surrogate for the principal place of business to justify considering the company at home there. While a "corporation that operates in many places can scarcely be deemed at home in all of them," *Daimler*, 134 S. Ct. at 762 n.20, nothing in *Daimler* indicates that a corporation may have two—and only two—forums in which it is subject to general jurisdiction. *Daimler*'s only reference to a "surrogate" corporate home is in its description of *Perkins*, not in a passage about general jurisdiction more generally. *See id.* at 756 n.8 ("Given the wartime circumstances [in *Perkins*], Ohio could be considered a surrogate for the place of incorporation or head office." (internal quotation marks omitted)).

Moreover, *Daimler* left *Perkins*, *Helicopteros*, and *Goodyear* intact. Those decisions consider a variety of contacts—such as registration to do business in a state, the maintenance of office files, and the ownership of property—to assess whether the exercise of general jurisdiction is proper. *See supra* pp. 43-45. Such discussion would have been wholly unnecessary if the only relevant question were whether a company had replaced its principal place of business with a substitute.

IV. Should This Court Disagree With Respondents' Position, Remand Is Appropriate.

In the state-court proceedings, respondents argued in the alternative that BNSF had consented to personal jurisdiction by seeking a certification of authorization to do business in Montana and by designating an in-state agent for service of process. The state supreme court acknowledged the argument but concluded that it "need not address" it. Pet. App. 19a n.3. If this Court does not affirm the decision below, it should remand to the Montana state courts to consider this alternate ground in the first instance.

Limitations on a state court's general jurisdiction do not apply where a defendant has "consented to suit in the forum." *Daimler*, 134 S. Ct. at 756 (internal quotation marks omitted). Historically, consent to suit by registration to do business in a state was a viable basis for the exercise of personal jurisdiction. *See Neirbo*, 308 U.S. at 175; *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917). Post-*International Shoe*, some courts have continued to hold that a company's registration to do business in a state or designation of an agent for service of process constitutes consent to personal jurisdiction. *See, e.g., Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990).

Whether BNSF has consented to suit by plaintiffs in Montana state courts hinges, at least in part, on the legal function that Montana's corporate registration statute is intended to serve. *See, e.g., Knowlton*, 900 F.2d at 1200; Restatement (Second) of Conflict of Laws § 44, cmt. c (1971). If this Court does not affirm on the grounds raised in Parts I, II, and III, it should remand for Montana courts to consider the consent argument, which may be

complicated in its own right, in the context of the state's own law.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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March 2017

APPENDIX

APPENDIX

28 U.S.C. § 1445, Nonremovable actions, provides in relevant part:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States.

45 U.S.C. § 56, Actions; limitations; concurrent jurisdiction of courts, provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Act of April 5, 1910, ch. 143, 36 Stat. 291, amending Section 6 of the Federal Employers' Liability Act provided:

> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent

with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Section 1 of the Judiciary Act of August 13, 1888, ch. 866, 25 Stat. 434, correcting the enrollment of the Judiciary Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, provided in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first section of an act entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:
>
> That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in

dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Montana

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement contained in the Brief for Petitioner remains accurate.

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S. Rep. No. 432,
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Other Authorities

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Black's Law Dictionary
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REPLY BRIEF FOR PETITIONER

The text and history of the Federal Employers Liability Act leave no doubt about the meaning of Section 56: Congress sought to expand venue in federal courts, and then to confirm the concurrent subject-matter jurisdiction of state courts. *Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55–56 (1912). Congress did not include in Section 56 a service-of-process provision, which is how Congress regulates personal jurisdiction in federal courts. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). And nothing in the text or legislative history suggests that Congress in FELA attempted to alter the personal jurisdiction of *state* courts.

Respondents' defense of the Montana Supreme Court's opinion rests upon statutory analysis that is detached from text, and upon constitutional theories that this Court has decisively rejected. Respondents and their amici do not cite a single statute in the history of the Republic in which Congress purported to alter the personal jurisdiction of state courts. While FELA is one of many statutes where Congress provided for "concurrent" jurisdiction between state and federal courts, Respondents do not identify any statute where that term means personal jurisdiction rather than subject-matter jurisdiction. Respondents also have no case suggesting that Congress even has the power to relieve the Fourteenth Amendment's limitations on state courts' personal jurisdiction. And Respondents certainly have no authority after *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), holding that "doing business" in a state—even significant business—is sufficient to support a state court's exercise of general "at home" jurisdiction over a foreign defendant.

Respondents' interpretation of FELA would raise serious constitutional questions and create massive uncertainty over whether other special venue statutes also embody undiscovered grants of personal jurisdiction. Moreover, Respondents' view of "at home" jurisdiction would eviscerate the simple and predictable jurisdictional rules of *Daimler*. The judgment of the Montana Supreme Court should be reversed.

I. FELA Did Not Alter The Personal Jurisdiction Of State Courts

Respondents ask this Court to reach an extraordinary conclusion: That Congress in FELA sought to alter the limitations on state courts' personal jurisdiction.

A. Section 56's "Concurrent" Jurisdiction Clause Does Not Affect State Courts' Personal Jurisdiction

Respondents concede, as they must, that the first sentence of Section 56 is explicitly limited to cases "[i]n [f]ederal [c]ourts." Resp. Br. 14. Thus, Respondents' defense of the Montana Supreme Court's holding depends on the concurrent-jurisdiction sentence, which (substantially unchanged since 1910) provides: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56.

1. Respondents contend (at 23) that this clause should be read to "extend[ ] to state courts the authority to exercise personal jurisdiction." But Respondents essentially ignore the *Second Employers' Liability Cases*, where this Court comprehensively analyzed FELA just two years after Section 56 was enacted and held that the concurrent-jurisdiction clause was adopted to correct the mistake of *Hoxie v. New York*,

New Haven & Hartford Railroad Co., 73 A. 754 (Conn. 1909), by confirming that Congress did not withdraw subject-matter jurisdiction over FELA actions from state courts. 223 U.S. at 55–56; *see also id.* at 56 (Section 56 is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure"). The statute's reference to jurisdiction "under this chapter" makes it especially clear that the clause refers to subject-matter jurisdiction, as Respondents concede. Resp. Br. 25.

Respondents say that, because the word "jurisdiction" in Section 56 is not explicitly preceded by "subject-matter," the clause can be read to refer to personal jurisdiction as well. Resp. Br. 24 (citing *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017)). But whereas the statute in *Lightfoot* interpreted the phrase "court of competent jurisdiction," the word "jurisdiction" in Section 56 is modified by the term "concurrent." Usages of "concurrent" jurisdiction appear throughout the United States Code, Pet. Br. 38, yet Respondents do not point to a single statute where that term refers to personal jurisdiction. Instead, since the First Congress, a statute referring to "concurrent" jurisdiction has meant that state and federal courts dually exercise subject-matter jurisdiction over the same claims. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 ("[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity" meeting certain criteria). That was plainly the understanding at the time Section 56 was enacted. *See Black's Law Dictionary* 673 (2d. ed. 1910) (defining "concurrent jurisdiction" as "[t]he jurisdiction of several different tribunals, both authorized to deal with the same subject-matter at the choice of the suitor").

The meaning of "concurrent" jurisdiction in Section 56 has been settled by that term's consistent usage across statutes over hundreds of years. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) ("[S]imilar language" in different statues "is 'a strong indication' that they are to be interpreted alike."). A long line of this Court's precedents confirms that the term refers to subject-matter jurisdiction. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 746 (2009) ("The assumption that state courts would continue to exercise concurrent jurisdiction over federal claims was essential to th[e Madisonian Compromise at the Constitutional Convention]."). FELA's legislative history also confirms that meaning. *See* H.R. Rep. No. 513, 61st Cong., 2d Sess. 10–12 (1910) (Rep. Sterling) (citing *Teal v. Fulton*, 53 U.S. 284, 292 (1851); *The Moses Taylor*, 71 U.S. 411, 428 (1866); *Ex Parte Siebold*, 100 U.S. 371, 392 (1879)).

Respondents assert (at 24) that other statutes referencing concurrent jurisdiction have a different "text and structure" than Section 56. But there is no meaningful difference between providing for, *e.g.*, concurrent jurisdiction "to prevent a violation of ... this section," 49 U.S.C. § 11501(c), Resp. Br. 24, and FELA's provision for concurrent jurisdiction "under this chapter," 45 U.S.C. § 56. Moreover, the consistent use of "concurrent" jurisdiction across different statutes with somewhat different structures only reinforces that concurrent jurisdiction means subject-matter jurisdiction.

Respondents' misreading of Section 56 gets no support from the two decisions on which they rely. *Contra* Resp. Br. 24–25. *Claflin v. Houseman*, 93 U.S. 130, 136 (1876), did not interpret a statutory term and

merely observed that, under our system of dual sovereignty, state and federal governments both exercise "concurrent" authority over the same places and people. *Claflin*, in fact, is this Court's seminal case describing the constitutional rule of concurrent *subject-matter* jurisdiction between state and federal courts. *See id.* at 136–37. Respondents' only other authority, *Alabama Great Southern Railroad Co. v. Federal Maritime Commission*, 379 F.2d 100, 102 (D.C. Cir. 1967), stands for the proposition that Congress intended to prevent subject-matter overlap in responsibility between two federal agencies. Nothing in this Court's cases supports Respondents' view that concurrent jurisdiction means personal jurisdiction.[1]

2. Respondents also ask the Court to read this clause in light of Congress's objective to "give plaintiffs an unusually broad right with respect to where to bring suit." Resp. Br. 32. But this Court already held in the *Second Employers' Liability Cases* that, for state courts, Congress's objective was to confirm subject-matter jurisdiction. 223 U.S. at 56. Respondents cite nothing in the legislative history suggesting that Congress gave any thought at all to the personal jurisdiction of state courts. That is not surprising, because prescribing the personal jurisdiction of state courts is a sovereign function of each state. *See Brown v. Gerdes*, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring) ("[T]he States are as free from control by

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[1] Since BNSF's opening brief, the Supreme Courts of Oregon and Missouri have each rejected Respondents' interpretation of Section 56. *Barrett v. Union Pac. R.R. Co.*, 361 Or. 115, 128–29 (2017) ("Confirming the state courts' concurrent subject matter jurisdiction over federal claims is not the same thing as conferring personal jurisdiction over out-of-state corporate defendants."); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, No. SC 95514, 2017 WL 770977, at *6–7 (Mo. Feb. 28, 2017).

Congress in establishing state systems for litigation as is Congress free from state control."). If Congress in passing FELA had sought to legislate for the first time on a matter so squarely within traditional state authority, then it needed to be "'reasonably explicit'" about it. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539–40 (1947)); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (it is "incumbent upon the federal courts to be certain of Congress's intent before finding that federal law" alters the qualifications for state-court judges) (quotation marks omitted).

There is no way to know for sure what Congress in 1910 might have assumed (or not) about state courts' personal jurisdiction thirty-five years before *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). If Congress had considered the matter, it may well have believed that these Respondents could not sue BNSF on these out-of-state cases in a Montana state court. *See Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough*, 204 U.S. 8, 21–23 (1907) (holding that a state court can serve process on a defendant that is "present" (*i.e.*, doing business) in the court's territory, so long as the cause of action arose from the defendant's business in that state). Regardless, whatever Congress may or may not have assumed, FELA is silent about state courts' personal jurisdiction. And "Congress' silence is just that—silence." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (quotation marks omitted). It is the text of the statue that controls, not a hypothetical statute Congress might have written if it had made different assumptions about other issues at the time of enactment.

Respondents continue to misread *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 50 (1941), which quoted Senator Borah for the proposition that Congress amended FELA to enable a plaintiff to "find the corporation at any point or place *or State* where it is actually carrying on business, and there lodge his action." Resp. Br. 26, 27, 35. Senator Borah made clear that he referred here to the purpose of the first sentence of Section 56, concerning *federal* courts. 45 Cong. Rec., 61st Cong., 2d Sess. 4034 (1910). Senator Borah then went on to describe separately the purpose of the concurrent-jurisdiction clause, which he said addressed "jurisdiction of the case," *i.e.*, subject-matter jurisdiction. *Id.* at 4035. Senator Borah never mentioned personal jurisdiction in state courts. *See* S. Rep. No. 432, 61st Cong., 2d Sess. 3–4 (1910) (Sen. Borah) (expanding where a FELA plaintiff could sue was the purpose of the first sentence of Section 56, whereas the second sentence addressed *Hoxie*).

Because Section 56's text did not address personal jurisdiction in state courts, the rule today is the same as it was in 1909: FELA plaintiffs may obtain jurisdiction over the defendant in any state court where authorized by state law, subject to the limits of the Fourteenth Amendment.

B. Section 56's Federal-Courts Clause Does Not Affect Personal Jurisdiction

1. Although this Court can reverse the judgment below without addressing the first sentence of 45 U.S.C. § 56, that sentence grants venue, not personal jurisdiction, to "court[s] of the United States." That is what this Court stated repeatedly in *Kepner*, 314 U.S. at 52. By describing where a case "may be brought," FELA used text that is consistent with 200 or so other special federal venue statutes. *See* H.R. Rep. No. 10,

112th Cong., 1st Sess. 18 & n.8 (2011) (when Congress amended the general federal venue statute, it recognized the "special venue rules that govern under particular Federal statutes," citing an American Law Institute report); Am. Law Inst., *Fed. Judicial Code Revision Project*, 253–90 (2004) (identifying special federal venue statutes, including FELA); 14D Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure* §§ 3811–25 (4th ed. 2013) (reviewing special venue statutes).

In addition, FELA does not address where service of process can issue, and personal jurisdiction *requires* "authorization for service of summons on the defendant." *Omni Capital*, 484 U.S. at 104. This Court recognized as early as 1838 that, when Congress seeks to expand federal courts' personal jurisdiction, it does so not by legislating where a case "may be brought," but by "authoriz[ing] any civil process to run into any other district." *Toland v. Sprague*, 37 U.S. 300, 327 (1838); *see also ibid.* ("Congress might have authorized civil process from any circuit court, to run into any state of the Union. It has not done so."). Congress exercised that option in legislation both before and shortly after 1910. *See* Credit Mobilier Act of 1873;[2] Clayton Act of 1914.[3] The absence of a similar clause in Section 56 demonstrates that FELA did not, and

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[2] Ch. 226, § 4, 17 Stat. 485, 509 (a "suit may be brought in the circuit court in any circuit," *and "writs of subpoena may be issued by said court against any parties defendant, which shall run into any district"*) (emphasis added).

[3] Ch. 323, § 12, 38 Stat. 730, 736 (a suit "may be brought not only in the judicial district whereof [a corporation] is an inhabitant, but also in any district wherein it may be found or transacts business; *and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found*") (emphasis added).

was not intended to, expand federal courts' personal jurisdiction. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–25 (1925) ("It is ... obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant.").

2. The legislative history shows, and Respondents agree (at 15), that Congress in 1910 was responding to the limitations imposed by the 1888 amendments to the Judiciary Act, which had limited *venue* to places where a corporation was an "inhabitant." Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434. *See Kepner*, 314 U.S. at 49.

Respondents contend, however, that this "inhabitant" provision also limited personal jurisdiction, in order to draw the inference that Congress intended to expand federal personal jurisdiction in Section 56 alongside the expansion of venue. Resp. Br. 16. Respondents are wrong: The 1888 Act's "inhabitant" limitation was a matter of venue only—it "relates to the venue of suits originally begun in [the District Courts]" and "merely confers a personal privilege on the defendant, which he may assert, or waive, at his election[.]" *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 655 (1923); *see also Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, 532 (1907) (although the federal court was a proper venue under the 1888 Act, "to obtain jurisdiction there must be service," and so it was necessary to determine the validity of service).

Personal jurisdiction in 1910 was governed by a different clause of the Judiciary Act providing that "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court," 25 Stat. at 434—a clause that, unlike the "inhabitant" venue clause, was the same in 1888 as in the

original Judiciary Act of 1789. *See* 1 Stat. at 79 & note *(b)* (referencing a judicial holding "that the circuit and district courts of the United States cannot ... send their process into another district, except where specifically authorized so to do by some act of Congress").[4] This Court interpreted the civil-arrests clause of the Judiciary Act in *Toland* to codify the common-law rule that "the circuit courts can issue no process beyond the limits of their districts." 37 U.S. at 330. Similarly in *Robertson*, the Court explained that, for "jurisdiction over the defendant," (as opposed to "venue"), the Judiciary Act established the "general rule," consistent with "the practice at common law," that a federal court "cannot issue process beyond the limits of the district." 268 U.S. at 622–23 (citing Section 11 of the Judiciary Act of 1789). And since *Robertson*, the Court has reiterated multiple times that changing federal personal jurisdiction requires changing options for service of process. *See Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 467–68 (1945); *Omni Capital*, 484 U.S. at 108–09; Pet. Br. 31–32 (reviewing statutes that expand service of process).

Respondents' reading of the 1888 Act's "inhabitant" clause as a personal-jurisdiction provision would produce bizarre results. The 1888 Act also provided that, in diversity cases, "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. at 434. But Congress would not attempt to authorize *personal jurisdiction* in a diversity case in the plaintiff's home district—where the defendant may have never visited at all. By contrast,

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[4] BNSF's opening brief (at 31) mistakenly quoted the sentence after the civil-arrests clause as controlling federal personal jurisdiction in 1910.

the clause makes perfect sense when understood (properly) as a venue provision.

3. Respondents have marshaled no authorities or provisions of FELA's legislative history to suggest that Congress was concerned about personal jurisdiction in 1910. Respondents' two citations to cases applying the general venue statute and referring to courts' "jurisdiction" or "plea[s] to the jurisdiction," Resp. Br. 16, are unreliable evidence. A "plea to the jurisdiction" was merely a type of special pleading, before the Federal Rules of Civil Procedure, whereby a defendant could challenge personal jurisdiction, venue, the amount in controversy, the plaintiff's capacity, standing, or other deficiencies. *See* 1 C.J.S. Abatement & Revival §§ 1–18 (2017). These cases do not imply, as Respondents assert, that venue and service of process were fused together in FELA in 1910.[5]

Respondents also cite (at 22) three decisions from the D.C. Circuit that, after *Omni Capital*, inferred service-of-process provisions from federal statutes. Those cases involved statutes establishing enforcement power in federal agencies, and the court of appeals concluded that an implication of expansive service was the only way to give those powers any meaningful effect. Section 56, by contrast, solved the particular problem that Congress was concerned about—

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[5] Similarly unhelpful is an unenacted proposed amendment to FELA in 1947. *Contra* Resp. Br. 32. While Congress declined to narrow venue, it also declined to expand venue to include the plaintiff's residence. *See* Br. of United States 17. The proposed amendment cuts both ways. Moreover, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (quotation marks omitted).

the Judiciary Act's limitation of venue to a corporation's "inhabitan[ce]." This Court has never inferred a service-of-process provision in a federal statute, and Respondents have not asked this Court to do so here.

Section 56's federal-courts clause is not a grant of personal jurisdiction because the text cannot bear that interpretation. "Congress knows how to authorize nationwide service of process when it wants to provide for it." *Omni Capital*, 484 U.S. at 106.

* * *

Because neither sentence of Section 56 can support the Montana Supreme Court's holding, Respondents fall back to asking for a "liberal[ ] construc[tion]" that would treat the two clauses "as a package" expanding state courts' personal jurisdiction. Resp. Br. 25–26. But Section 56 is not greater than the sum of its parts. Congress was explicit about its particular intent for each piece of the 1910 amendments to FELA: Congress sought to expand the venue of federal courts, to prevent state courts from refusing to hear FELA cases for lack of subject-matter jurisdiction, and to prevent removal of FELA cases from state court. *Second Employers' Liability Cases*, 223 U.S. at 55–56; *Kepner*, 314 U.S. at 52; S. Rep. No. 432, *supra*, at 3 ("The proposed amendments to [FELA] may be considered under [several] heads: First, as to the venue of such an action; second, as to the concurrent jurisdiction of the courts of the several states[.]"). That is it. There is no ambiguity about the meaning of Section 56, and no role for liberal construction. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) ("the statute's remedial purpose cannot compensate for the lack of a statutory basis").

C. Respondents Continue To Misread FELA Precedents

1. It is telling that Respondents cannot cite a single case in the more than 100 years since 1910 stating that Section 56 confers personal jurisdiction on state courts. As BNSF has already shown (at 41–44), not one of this Court's precedents interpreted FELA to confer personal jurisdiction; the cases cited by Respondents involved different issues altogether. Contrary to Respondents' brief (at 28), there is no "established practice" allowing state courts to exercise personal jurisdiction based on FELA.

At most, the Court in some cases may have made unstated assumptions about the *constitutional* limits on personal jurisdiction, which were very different in the era before *International Shoe*. *See Daimler*, 134 S. Ct. at 761 n.18. But the Court did not *interpret FELA* to confer personal jurisdiction. *See* Br. of United States 23 ("It may well be that the Court in those cases believed that a state court hearing a FELA case could exercise personal jurisdiction over a defendant railroad doing business in the State. But that does not mean that the Court was of the view that Section 56, as opposed to state law, made the defendant amenable to summons."). It is Respondents' position that threatens an established practice, two centuries old, in which Congress does not attempt to alter the personal jurisdiction of the state courts.

Respondents suggest (at 28) that, after *International Shoe*, Judge Learned Hand held that FELA conferred personal jurisdiction. Resp. Br. 28 (citing *Kilpatrick v. Tex. & Pac. Ry. Co.*, 166 F.2d 788 (2d Cir. 1948)). That is incorrect. *Kilpatrick* was filed in federal court, where the Fourteenth Amendment and *International Shoe* did not apply. Moreover, the issue in

Kilpatrick was not personal jurisdiction—which the defendant had waived—but forum non conveniens. *Id.* at 790–91. Similarly, *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949) (per curiam), is unhelpful to Respondents. *Contra* Resp. Br. 31. That case interpreted not Section 56 but a different provision of FELA, and the defendant did not contest personal jurisdiction.

2. Respondents offer unconvincing interpretations of the cases from this Court that directly refute their position. In response to *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3 (1950), where this Court stated that, in a FELA case, a state court must have personal jurisdiction, Respondents say (at 29) that "context" shows the Court referred "to the limitations of a state's local law, not FELA." That is precisely the point: State law, not FELA, determines personal jurisdiction in state courts, subject to the Fourteenth Amendment's limits. *See, e.g., Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387 (1929) (a state court may decline to hear a FELA case for lack of personal jurisdiction under state law); *Taylor v. S. Ry. Co.*, 182 N.E. 805, 807 (Ill. 1932) (FELA does not give jurisdiction "to any specified state courts" or limit "the venue in such state courts").

FELA's silence as to personal jurisdiction is also reflected in Section 56's clause prohibiting removal from a state court of "competent jurisdiction," *contra* Resp. Br. 30 n.9, meaning a court with subject-matter *and personal* jurisdiction under state law. *See* Pet. Br. 39–40.

D. Respondents' Arguments Would Unsettle Other Venue Statutes And Cripple *Daimler*

1. Respondents' argument that venue provisions can sometimes carry hidden, as-yet unrevealed grants of personal jurisdiction, if accepted, will invite a tidal wave of new litigation about whether the wide range of other special venue statutes also alter personal jurisdiction in state courts. Some of these statutes, like FELA, were enacted in response to the 1888 Act's "inhabitation" limitation on venue, including the Copyright Act, ch. 320, § 35, 35 Stat. 1075, 1084 (1909), which was enacted one year before Section 56. 28 U.S.C. § 1400(a) (a case "may be instituted in the district in which the defendant or his agent resides or may be found"); *see also* Pet. Br. 31–32; Wright & Miller, *supra*.

2. Respondents' argument would also undermine *Daimler*'s constitutional limitations on state courts' personal jurisdiction. Respondents and their amici contend that it would be unjust if those BNSF employees who travel out-of-state to perform their jobs were unable to sue in their home states. *E.g.*, Resp. Br. 34–35. But it is difficult to treat Respondents seriously when *they* deliberately traveled "far from their homes," Resp. Br. 32, to sue in state court in Montana.

In any event, there is nothing unusual or unjust about a plaintiff who, being injured while visiting another state, cannot obtain *general* personal jurisdiction in his home state. What Respondents dismissively label "BNSF's theor[y]" (at 34) is actually this Court's unanimous holding in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 n.5 (2011), that the Due Process Clause makes the plain-

tiff's residence irrelevant to general personal jurisdiction. As the Court has explained, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014). Even FELA does not extend venue to the plaintiff's home state.

For those rail employees who happen to be injured in a state that is not their regular place of employment, this Court has developed a whole body of specific-personal-jurisdiction jurisprudence to determine where a case arises. This Court has held that a plaintiff's residence may sometimes "strengthen the case for the exercise of *specific jurisdiction*," *Goodyear*, 564 U.S. at 929 n.5, although residence alone ordinarily is not "decisive," *Walden*, 134 S. Ct. at 1125 (quotation marks omitted). But these principles are not at issue here because Respondents have abandoned a claim to specific personal jurisdiction: They brought suit in a state that was not their ordinary workplace and where they do not allege that any wrongdoing or injury occurred.

II. *DAIMLER* FORECLOSES GENERAL PERSONAL JURISDICTION IN THESE CASES

1. Respondents ask this Court to hold that BNSF is "at home" in Montana because it has a "substantial, ongoing *presence* in [the] state." Resp. Br. 42. This is little more than a request for the Court to retract its opinion in *Daimler*. *See* 134 S. Ct. at 761 (rejecting as "unacceptably grasping" general personal jurisdiction "in every State in which a corporation engages in a substantial, continuous, and systematic course of business") (quotation marks omitted).

BNSF is not at home in Montana any more than Daimler AG was at home in California, on any relevant metric. Respondents emphasize, for example, that BNSF is the largest railroad in Montana, that it has significant property in the state including a division headquarters, and that it generates billions of dollars in annual revenue from Montana operations. Resp. Br. 47–49. But Daimler, acting through its United States subsidiary (whose contacts the Court assumed were attributable to Daimler, 134 S. Ct. at 760), was "the largest supplier of luxury vehicles to the California market," which itself was the largest in the United States, accounting for 10% of all new car sales. *Id.* at 752. Daimler had multiple corporate properties in California "including a regional headquarters," and an enormous volume of business—importing 200,000 vehicles per year for a total of $4.6 billion in sales, *id.* at 767 (Sotomayor, J., concurring in judgment).

BNSF's ordinary business activities in Montana are nothing like the facts of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the nerve center of corporate decision-making had moved to the forum state of Ohio. BNSF runs trains through Montana, but it indisputably runs the company from Fort Worth, Texas. Nor are railroads unique in operating interstate while owning property in several states. *Contra* Resp. Br. 49. Interstate companies in every sector of the American economy—airlines, hotel chains, cable companies, retailers, manufacturers, financial institutions, energy, technology, insurance, and health-care companies—all do business that way.

2. More fundamentally, Respondents' arguments are an attack on the reasoning that underlies *Daimler*, where this Court adopted "[s]imple jurisdictional

rules" for general personal jurisdiction—focused on the "paradigm[s]" of a corporate defendant's place of incorporation and principal place of business—in order to "promote greater predictability." 134 S. Ct. at 760 (quotation marks omitted). Although the Court noted the possibility that a corporation could be "at home" on exceptional facts like those in *Perkins*, the Court stated that such a case would need to be based on an "appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20. Here, across any relevant measure, that appraisal shows that BNSF's Montana contacts are merely a fraction of its nationwide operations. JA26–JA27 (BNSF earns less than 10% of its revenue in Montana and has less than 5% of its workforce there).

Daimler also held that a company can be at home only in places that are "unique" and "easily ascertainable," 134 S. Ct. at 760, without the need for "much in the way of discovery," *id.* at 762 n.20. Yet Respondents would have this Court sift through affidavits, reports, maps, administrative filings, newspaper clips, political contributions, and more, Resp. Br. 47–49—much of which Respondents did not include in the record below—to evaluate the extent of BNSF's "presence" in Montana. Respondents' test also would make a company like BNSF "at home" in 28 different states, contrary to *Daimler*'s express holding that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." 134 S. Ct. at 762 n.20.

Respondents' argument for general "all purpose" jurisdiction fails because they cannot show why BNSF's activity in Montana, however substantial, "should give [the] State authority over a far larger quantum of activity having no connection to any in-

state activity." *Daimler*, 134 S. Ct. at 762 n.20 (quotation marks and alterations omitted).[6]

III. Congress Cannot Authorize States To Exercise Personal Jurisdiction That The Fourteenth Amendment Forbids

Even if the text of Section 56 could bear Respondents' reading, this Court should reject their interpretation in order to avoid raising grave constitutional questions.

1. The Due Process Clause protects states' "status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). But the Montana courts operated outside their legitimate sphere of authority and intruded upon the sovereignty of sister states when they arrogated the power to issue judgments over parties from other states involving events that took place in other states. Even if Respondents' reading of Section 56 were correct, congressional approval would not diminish the sovereign injury.

Moreover, the Due Process Clause protects defendants' individual liberty interest in avoiding "the

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[6] Respondents contend (at 50) that they have a viable argument that BNSF consented to general jurisdiction in Montana by registering and appointing an agent for service. But courts after *Daimler* have strongly suggested that it would be unconstitutional for a state to force a corporation to consent to unlimited personal jurisdiction as a price for doing business in the state. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016). Respondents' argument is also frivolous under Montana law, which provides that "[t]he appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state." Mont. Code Ann. § 35-7-115.

burdens of litigating in a distant or inconvenient forum" without a reasonable relationship between the defendant, the forum, and "the particular suit which is brought there." *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *International Shoe*, 326 U.S. at 317). Due process also guarantees "some minimum assurance" of where the defendant will be "liable to suit." *Daimler*, 134 S. Ct. at 761–62 (quotation marks omitted). BNSF would suffer those constitutional injuries if Respondents were right that Mr. Nelson's slip-and-fall in Washington could be litigated in any of the 28 states where BNSF does business, or if BNSF were forced to defend these cases in a Montana court with no connection to the parties or events.

2. Respondents do not cite a single authority for their contention (at 36) that a state can deny due process of law in violation of the Fourteenth Amendment, so long as Congress approves. That is unsurprising, as this Court has repeatedly held just the opposite. Pet. Br. 48–49, 52. That Congress has never attempted to expand state courts' personal jurisdiction beyond due-process limits is persuasive evidence that such a power is "constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 230 (1995).

Respondents reply that this Court has not addressed the *Fifth Amendment* limits on Congress's power to "confer[ ] personal jurisdiction." Resp. Br. 41. What the Court has reserved is the limit of Congress's power to authorize personal jurisdiction in "*federal* court[s]." *Omni Capital*, 484 U.S. at 102 n.5 (emphasis added). The plurality in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011), similarly reserved judgment on the hypothetical in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 n.* (1987), where Congress

"authorize[d] federal court personal jurisdiction." The plurality did not endorse a never-before-seen power in Congress to authorize states to exercise personal jurisdiction beyond the Fourteenth Amendment's limits. *Contra* Resp. Br. 37.[7]

Respondents are also mistaken (at 36–38) about which constitutional limit applies to these cases. It is the Montana state courts that have attempted to exercise personal jurisdiction over BNSF, so it is the Fourteenth Amendment that restrains them. BNSF needs relief against the State, not the United States, in order to prevent the unconstitutional exercise of jurisdiction, and only the Fourteenth Amendment can provide that relief. This Court's cases have invoked the Fourteenth Amendment—not the Fifth Amendment—in order to prohibit challenged state actions irrespective of purported congressional authorization. Pet. Br. 48–49, 52.[8]

The Due Process Clause is an unequivocal prohibition that makes no exception for congressional authorization, mirroring the text of the "[n]o State shall ... " prohibitions in Article I, section 10, clause 1. The Fourteenth Amendment did not need any other clauses to make its ban absolute. *Contra* Resp. Br. 41.

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[7] Contrary to Respondents' brief (at 39), BNSF did not concede that Congress could authorize personal jurisdiction over these FELA cases in a Montana federal court. Congress did not authorize that, and the cases were not brought in federal court, so the issue is not presented. Pet. Br. 33 n.4.

[8] Respondents' suggestion (at 41–42) that BNSF forfeited its constitutional objection is demonstrably incorrect. BNSF argued that FELA cannot be interpreted to confer personal jurisdiction that the Fourteenth Amendment forbids both to the Montana Supreme Court (as Justice McKinnon recognized, Pet. App. 29a–30a) and in the Petition for Certiorari, Pet. 23.

The generation that ratified the Fourteenth Amendment at the close of the Civil War—partly to ensure that newly freed slaves were not murdered or dispossessed of their property, *Slaughter-House Cases*, 83 U.S. 36, 71 (1872)—would not have allowed states to take life, liberty, or property without due process simply because a future Congress approved. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 958 (1995) (the Fourteenth Amendment was enacted in part "to ensure that future Congresses would not be able to repeal" the 1866 Civil Rights Act). The Amendment gave Congress the power to enforce its protections, U.S. Const. amend XIV, § 5; it did not leave those protections vulnerable to congressional override.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

BNSF RAILWAY CO., PETITIONER

v.

KELLI TYRRELL, SPECIAL ADMINISTRATOR FOR THE ESTATE OF BRENT T. TYRRELL, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a provision of the Federal Employers' Liability Act, 45 U.S.C. 56, authorizes a state court adjudicating a claim under that Act to exercise personal jurisdiction over a non-resident defendant that is doing business in the State.

2. Whether the Montana courts' exercise of personal jurisdiction over petitioner, a railroad incorporated in Delaware with its principal place of business in Texas, in an action based on injuries incurred outside the State, violates due process.

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In the Supreme Court of the United States

No. 16-405

BNSF RAILWAY CO., PETITIONER

v.

KELLI TYRRELL, SPECIAL ADMINISTRATOR FOR THE ESTATE OF BRENT T. TYRRELL, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves a state court's assertion of general personal jurisdiction over an out-of-state corporation to adjudicate a cause of action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* The FELA provides a federal cause of action for injured railroad workers to sue their employers for negligence. See 45 U.S.C. 51; see also, *e.g.*, *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 165 (2007). Although courts (rather than federal agencies) administer the FELA, 45 U.S.C. 51, the United States has an interest in ensuring that the FELA is interpreted correctly in order to promote the safe, economic, and efficient operation of the national railway system. Further, federal agencies administer other federal statutes that use language similar to that found in 45 U.S.C. 56, and the United States has an interest in ensuring that those

statutes are interpreted correctly. Finally, the United States has an interest in the due-process limitations on state court exercises of personal jurisdiction over out-of-state corporations because of the potential effects of such rules on interstate and foreign commerce.

STATEMENT

1. In order for a state court to lawfully exercise personal jurisdiction over a defendant in a civil suit, two requirements must be met.

First, the defendant must be amenable to service of summons. *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (*Omni*). "Absent consent," a defendant is amenable to service of summons only where there is a law affirmatively "authoriz[ing] * * * service of summons on the defendant." *Ibid.*

Second, the state court's exercise of personal jurisdiction over the defendant must comport with due process. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923 (2011) (*Goodyear*). As a general matter, due process requires that a defendant "not present within the territory of the forum" have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). The nature and quality of contacts needed for a State's exercise of personal jurisdiction to satisfy due process depend on whether the state court is exercising specific jurisdiction, *i.e.*, the limited authority to decide a particular suit, or general jurisdiction, *i.e.*, the authority to adjudicate any and all matters involving the defendant. See *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 & nn.8-9 (1984).

This case concerns only general jurisdiction. A state court may exercise general personal jurisdiction over a corporation only when the State is its place of incorporation or its principal place of business, or the corporation's contacts with the State are otherwise so "continuous and systematic" that the defendant is "essentially at home" in that State. *Goodyear*, 564 U.S. at 919; see *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 760 (2014).

2. Petitioner is an interstate freight railroad network. Pet. App. 17a. It is incorporated in Delaware and maintains its principal place of business in Texas. *Id.* at 39a, 48a. It operates railroad lines in 28 States, including Montana. *Id.* at 39a. In Montana, petitioner operates approximately 2700 miles of railroad track (6% of its total mileage), employs approximately 2100 employees (5% of its total payroll), and obtains "less than 10%" of its total revenues. *Id.* at 17a, 63a; J.A. 26-27, 37-41. Further, petitioner's operations in some of the other 27 States in which it operates are "far greater" than its operations in Montana. Pet. App. 38a.

Respondents are Robert Nelson and the administrator of the estate of Brent Tyrrell. Nelson and Tyrrell both worked for petitioner in States other than Montana. Pet. App. 2a. Nelson, a North Dakota resident, alleged that he sustained knee injuries while working for petitioner in Washington State. *Id.* at 3a, 36a. The administrator of Tyrrell's estate (his wife), who is a South Dakota resident, alleges that Tyrrell was exposed to carcinogenic chemicals while working in States other than Montana and that the chemical exposure caused his premature death. *Id.* at 3a, 42a, 49a.

3. Respondents each filed suit against petitioner in Montana state court, bringing claims under the FELA

for injuries sustained while working for petitioner. Pet. App. 2a. Respondents argued that the state courts have general personal jurisdiction over petitioner based on its operations in Montana. *Id.* at 3a-4a, 38a, 63a-64a.[1] Petitioner moved to dismiss both cases on the ground that due process does not permit the state courts to exercise general personal jurisdiction over it. *Id.* at 36a, 47a-48a.

Two state trial courts reached opposite conclusions on the personal-jurisdiction issue. In Nelson's case, the trial court granted petitioner's motion to dismiss, Pet. App. 36a-40a, reasoning that it could not exercise general personal jurisdiction over petitioner because petitioner is not "essentially at home" in Montana, *id.* at 38a-40a (relying on *Daimler*). Nelson appealed.

In Tyrrell's case, the trial court denied petitioner's motion to dismiss, Pet. App. 47a-73a, concluding that what it characterized as petitioner's "substantial, continuous and systematic activities within Montana" make it subject to general personal jurisdiction, *id.* at 55a; see *id.* at 64a. The court certified its decision as final, *id.* at 41a-46a, and the Montana Supreme Court accepted petitioner's appeal, *id.* at 34a-35a. The Montana Supreme Court then consolidated the two cases. *Id.* at 2a.

4. The Montana Supreme Court held that Montana courts may exercise general personal jurisdiction over petitioner in both cases because petitioner is doing business in Montana. Pet. App. 1a-19a.

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[1] Respondents also argued that petitioner had consented to the state courts' exercise of personal jurisdiction over it. The Montana Supreme Court declined to address that argument, Pet. App. 19a n.3, and it is not before this Court.

The Montana Supreme Court first concluded that the FELA itself authorizes the state courts to exercise personal jurisdiction over petitioner. Pet. App. 5a-15a. The court relied on 45 U.S.C. 56, which provides in pertinent part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

The court read Section 56 as affirmatively authorizing state courts to exercise personal jurisdiction over a defendant anywhere that defendant does business. Pet. App. 6a-9a, 14a. The court also believed that decisions of this Court established that "railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" *Id.* at 12a; see *id.* at 6a-9a, 12a-13a. The court rejected the view that this Court's decision in *Daimler* limits the Montana courts' exercise of personal jurisdiction over petitioner; in the court's view, *Daimler* is inapposite because it "did not involve a FELA claim or a railroad defendant." *Id.* at 11a; see *id.* at 9a-12a.

The Montana Supreme Court then held that state law also authorizes the state courts to exercise personal jurisdiction over petitioner. Pet. App. 15a-19a. The court observed that Montana's long-arm statute permits its courts to exercise general personal jurisdiction over "[a]ll persons found within the state of Montana," Mont. R. Civ. P. 4(b)(1), and it concluded that petitioner is "found within" the State because it

has over 2000 miles of railroad track and over 2100 employees in Montana, Pet. App. 16a-17a. The court rejected petitioner's argument that the state courts' exercise of general personal jurisdiction under state law violated due process, again because it deemed *Daimler* inapposite. *Id.* at 17a-19a.

Justice McKinnon dissented. Pet. App. 20a-33a. In her view, the FELA does not address personal jurisdiction, and state law therefore is the source of the state courts' power to exercise personal jurisdiction over petitioner. *Id.* at 29a-30a. That exercise of state judicial power, she concluded, is inconsistent with the Fourteenth Amendment's Due Process Clause because petitioner is not "essentially at home" in Montana. *Id.* at 20a (citations omitted); see *id.* at 23a-25a.

SUMMARY OF ARGUMENT

The Montana Supreme Court held that the State's trial courts may exercise general personal jurisdiction over a railroad defendant in Montana when the plaintiff brings a claim under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, and the defendant is doing business in the State. That is true, the court held, even when the plaintiff is not a resident of Montana; the FELA cause of action arose outside of Montana; and the defendant is not incorporated, headquartered, or otherwise essentially at home in Montana. The Montana Supreme Court erred.

I. The Montana Supreme Court mistakenly interpreted the FELA to confer on state courts the authority to exercise personal jurisdiction over any defendant doing business in the State. To authorize an exercise of personal jurisdiction, the FELA itself would have to make the defendant amenable to service of process. But the relevant provision of the FELA, 45

U.S.C. 56, says nothing about service of process in state courts. Instead, it prescribes rules for venue in federal district court and provides that state and federal courts have concurrent subject-matter jurisdiction over FELA actions. Section 56's drafting history confirms that Congress intended to address only venue and subject-matter jurisdiction when it enacted the language at issue. The Montana Supreme Court based its contrary holding on four of this Court's decisions, but none of them held that Section 56 affirmatively authorizes a state court to exercise personal jurisdiction over any defendant doing business in the State.

Although the FELA does not itself authorize the state courts to exercise personal jurisdiction in this case, the Montana Supreme Court held (and petitioner does not dispute) that the state long-arm statute does. The state courts' exercise of personal jurisdiction based on the state long-arm statute is subject to review under the Due Process Clause of the Fourteenth Amendment.

II. The Montana Supreme Court erred in concluding that the Fourteenth Amendment's Due Process Clause permits Montana state courts to exercise personal jurisdiction over petitioner. This case concerns only general personal jurisdiction. As this Court has explained, a state court may exercise general personal jurisdiction over an out-of-state corporation "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 751 (2014) (brackets in original) (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923 (2011)).

The Montana Supreme Court deemed that due-process rule inapplicable, but its reasons lack merit.

Under *Goodyear* and *Daimler*, the Montana state courts may not exercise general personal jurisdiction over petitioner. Petitioner is not incorporated in Montana; it does not have its principal place of business in Montana; and it is not essentially at home in Montana. The Montana Supreme Court premised its due-process holding on the fact that petitioner does substantial and continuous business in Montana. But this Court has rejected the view that doing business in a State is sufficient to subject a corporate defendant to general personal jurisdiction in the State's courts. The judgment of the Montana Supreme Court should be reversed.

ARGUMENT

I. THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT CONFER AUTHORITY ON STATE COURTS TO EXERCISE PERSONAL JURISDICTION OVER ANY DEFENDANT DOING BUSINESS IN THE STATE

The first requirement for a state court to exercise personal jurisdiction over a defendant is that the defendant is amenable to service of process, either because the defendant consents or because a law provides for such process. Contrary to the view of the Montana Supreme Court, the FELA does not itself provide for service of process in state courts. Accordingly, the state courts' exercise of personal jurisdiction in this case is based only on state law, and not on federal law.

A. The Text Of Section 56 Does Not Affirmatively Authorize A State Court To Assert Personal Jurisdiction Over A Defendant

1. A court may exercise personal jurisdiction over a defendant in a civil action only when "the procedural requirement of service of summons" is satisfied. *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). A "summons" is a document that commences a legal action and requires the defendant to appear and answer, and "service of summons" is the procedure by which that document is delivered to the defendant. See, *e.g.*, *Black's Law Dictionary* 1576, 1665 (10th ed. 2014).[2] Through service of summons, "a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 444-445 (1946).

Absent consent, service of summons may be effectuated only if applicable law makes the defendant "amenab[le] to service of summons" by affirmatively "authoriz[ing] * * * service of summons on the defendant." *Omni*, 484 U.S. at 104. That authorization typically takes the form of a statute or rule that expressly provides for service of process. *Id.* at 104-105. In *Omni*, for example, this Court rejected the view that a provision of the Commodity Exchange Act that did not expressly address service of process "implicit-

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[2] "Service of summons" refers to service of a particular type of document, whereas "service of process" refers more broadly to service of several different types of documents. See *Black's Law Dictionary* 1399, 1576, 1665; see also Fed. R. Civ. P. 4, 4.1. "Service of summons" and "service of process" often are used interchangeably; when used in this brief, both refer to service of a document to bring a defendant into court to answer a lawsuit.

ly" authorized nationwide service of process for claims brought in federal court under that statute. *Id.* at 103; see 7 U.S.C. 25(c) (1982). Remarking that "Congress knows how to authorize nationwide service of process when it wants to provide for it," the Court declined to read such a provision into an otherwise silent federal statute. *Omni*, 484 U.S. at 106.

2. The question here is whether the FELA itself provides for service of summons. The relevant provision of the FELA is Section 56, which provides in pertinent part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. 56.[3] This language does two things: it specifies the federal judicial districts in which venue is proper, and it authorizes concurrent state and federal subject-matter jurisdiction over FELA actions. It does not address personal jurisdiction because it does not set out a "means of bringing the defendant before the court." *Mississippi Publishing Corp.*, 326 U.S. at 445.

The first sentence of Section 56 quoted above "establishes venue for an action in the federal courts." *Baltimore & Ohio R.R.* v. *Kepner*, 314 U.S. 44, 52

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[3] Section 56 also includes a statute-of-limitations provision not at issue here. See 45 U.S.C. 56 ("No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.").

(1941); see, *e.g.*, *Ex parte Collett*, 337 U.S. 55, 60 (1949) (Section 56 "defines the proper forum" for a federal FELA action). That language says nothing about state courts, instead referring only to a "district court of the United States," meaning a federal district court. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 29 n.18 (1984) (explaining that "courts of the United States" is a "term of art" meaning federal courts). And the sentence provides rules for venue, not personal jurisdiction. It defines where an action "may be brought," language typically used to designate venue. *Kepner*, 314 U.S. at 56 (Frankfurter, J., dissenting) (citations omitted) (noting that "[t]he phrasing of [Section 56] is not unique: it follows the familiar pattern generally employed by Congress in framing venue provisions," and providing examples).

The next sentence of Section 56 likewise does not address personal jurisdiction. As this Court has recognized, it addresses subject-matter jurisdiction. See *Mondou* v. *New York, New Haven & Hartford R.R. (Second Employers' Liability Cases)*, 223 U.S. 1, 55-56 (1912). The sentence says that state courts have "concurrent" jurisdiction "under this chapter," meaning that both state and federal courts have jurisdiction over a particular type of action—a FELA action. The sentence says nothing about a court's power over a defendant, as opposed to the power to hear a certain type of case.

3. The Montana Supreme Court erred in interpreting Section 56's text to address personal jurisdiction. The court read the reference to "concurrent" jurisdiction to refer to both subject-matter jurisdiction and personal jurisdiction. Pet. App. 14a. But "[t]he phrase 'concurrent jurisdiction' is a well-known term of art

long employed by Congress and courts to refer to subject-matter jurisdiction." *Id.* at 30a (McKinnon, J., dissenting) (citing statutes and cases); see *Black's Law Dictionary* 980 (first definition); see also Pet. Br. 38 (providing examples in various federal statutes).

In order to affirm the Montana Supreme Court's view that Section 56 authorizes a state court to exercise personal jurisdiction over any defendant doing business in the State, the Court would have to conclude that both the venue sentence and the subject-matter-jurisdiction sentence refer to personal jurisdiction in state courts. But such an interpretation would override the venue sentence's limitation to federal courts, and it would confuse the concepts of personal jurisdiction, subject-matter jurisdiction, and venue. Personal jurisdiction is a court's power to exercise control over a defendant. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Black's Law Dictionary* 982. It is different from a court's power to hear a certain type of action (subject-matter jurisdiction) and the appropriate place for the action to proceed (venue). See *Black's Law Dictionary* 983, 1790. The most natural reading of Section 56 is that it addresses only venue and subject-matter jurisdiction, and not personal jurisdiction. See, *e.g.*, *Barrett* v. *Union Pac. R.R.*, 361 Or. 115, 128-129 (2017) (analyzing Section 56's text and concluding that it does not address personal jurisdiction); *State ex rel. Norfolk S. Ry. Co.* v. *Dolan*, No. SC95514, 2017 WL 770977, at *6-*7 (Mo. Feb. 28, 2017) (same).

4. Congress's failure to mention service of process in Section 56 is telling. When Congress wishes to provide for service of process, it knows how to do so. As the Court recognized in *Omni*, 484 U.S. at 103-106,

many federal statutes provide for nationwide service of process. See, *e.g.*, 15 U.S.C. 22 (Clayton Act); 15 U.S.C. 53 (Federal Trade Commission enforcement action); 15 U.S.C. 77v(a) (Securities Act of 1933); 15 U.S.C. 78aa(a) (Securities Exchange Act of 1934); 18 U.S.C. 1965(d) (Racketeer Influenced and Corrupt Organizations Act); 29 U.S.C. 1132(e)(2) (Employee Retirement Income Security Act of 1974); 31 U.S.C. 3732 (False Claims Act). Although the precise formulations vary, these statutes generally use language addressing how "process" (or a "summons") may be "served." *Ibid.*

Indeed, Congress used such language when it enacted the Clayton Act in 1914, just four years after it added the language at issue here to the FELA. In the Clayton Act, Congress expressly addressed both venue and personal jurisdiction, providing: "That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and *all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.*" Clayton Act, ch. 323, § 12, 38 Stat. 736 (emphasis added) (current version codified at 15 U.S.C. 22). That text confirms that Congress typically uses different language to address venue and personal jurisdiction, and that the way Congress authorizes an exercise of personal jurisdiction is by making a defendant amenable to service of process, not by remaining "silent as to service of process." *Omni*, 484 U.S. at 106.

B. The History Of Section 56 Confirms That The Provision Does Not Address Personal Jurisdiction

Section 56's drafting history confirms that it was designed to address only venue and subject-matter jurisdiction, not personal jurisdiction. When the FELA was originally enacted, it did not address either venue or subject-matter jurisdiction. Instead, Section 6 of the Act (the provision codified at 45 U.S.C. 56) contained only a statute of limitations. Act of Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66. Shortly thereafter, two issues arose that led Congress to amend Section 56.

1. The first issue was that venue for FELA actions was too limited. Because the original FELA contained no venue provision, the general federal venue statute applied in FELA cases. *Kepner*, 314 U.S. at 49. That statute "fixed the venue of [federal-question] suits in the United States courts * * * in districts of which the defendant was an inhabitant," thereby requiring injured railroad employees to "go to the possibly far distant place of habitation of the defendant" to bring a FELA action. *Ibid.*; see Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 434 (U.S. Comp. Stat. 1901, at 508).

Congress added a venue provision to Section 56 to address that concern. It read: "Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." Act of Apr. 5, 1910 (1910 Act), ch. 143, § 1, 36 Stat. 291.[4] The legislative history explained that this sentence was added to expand the

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[4] Congress later substituted "district court" for "circuit court" in this provision. Act of Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167.

available venues for FELA actions brought in federal court. The House Report cited two federal decisions interpreting the federal venue statute, then explained that the amendment was designed "to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.'" H.R. Rep. No. 513, 61st Cong., 2d Sess. 6 (1910) (House Report) (citing *Macon Grocery Co.* v. *Atlantic Coast Line R.R.*, 215 U.S. 501 (1910) (freight tariff case), and *Cound* v. *Atchison, T. & S.F. Ry. Co.*, 173 F. 527 (C.C.W.D. Tex. 1909) (FELA case)). The Senate Report adopted the House Report's discussion of the amendment's purpose. S. Rep. No. 432, 61st Cong., 2d Sess. 3-5 (1910) (Senate Report). Neither Report said anything about personal jurisdiction. And when this Court recounted the history of this amendment in *Kepner*, it also concluded that the amendment was intended to address venue in the federal courts. See 314 U.S. at 49-50. The Court made no mention of personal jurisdiction in the state courts.

2. The second issue that arose shortly after the FELA's enactment was whether state courts had the power and obligation to hear FELA claims. In 1909, the Connecticut Supreme Court held that Congress intended to limit FELA claims to the federal courts and that States had no obligation to enforce FELA rights. *Hoxie* v. *New York, N. H. & H. R. Co.*, 73 A. 754, 759-760, 762. Congress responded by adding language to Section 56 confirming that state and federal courts have concurrent jurisdiction over FELA actions: "The jurisdiction of the courts of the United States under

this Act shall be concurrent with that of the courts of the several States." 1910 Act § 1, 36 Stat. 291.[5]

The House and Senate Reports explained that this amendment corrected the "erroneous" view of the Connecticut Supreme Court that a "state court is not authorized and required to enforce federal statutes." House Report 7, 11; Senate Report 5, 9; see 45 Cong. Rec. 2253-2254 (1910) (statement of Rep. Sterling); 45 Cong. Rec. at 3995 (statement of Sen. Borah). The Reports explained that, although state and federal courts always had concurrent subject-matter jurisdiction over FELA actions, "no harm can come" from "an express declaration that there is no intent on the part of Congress to confine remedial actions brought under the employers' liability act to the courts of the United States." House Report 7; Senate Report 5. In explaining the need for the amendment, the Reports discussed only jurisdiction over the subject matter—"cases arising under the act" or "remedial actions brought under the employers' liability act," *ibid.*—and not jurisdiction over the defendant. In the *Second Employers' Liability Cases*, this Court reviewed that history and concluded that the 1910 amendment was intended to "emphasize[]" what was already true—that federal courts do not have exclusive subject-matter jurisdiction over FELA actions. 223 U.S. at 56.

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[5] Congress also provided that "no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." 1910 Act § 1, 36 Stat. 291; see *Miles* v. *Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942) (addressing history of this language in the House and Senate). In 1948, Congress moved that language from Section 56 to 28 U.S.C. 1445(a). See Act of June 25, 1948, ch. 646, §§ 1, 18, 62 Stat. 939, 989.

3. According to the Montana Supreme Court, Congress's key concern in amending the FELA in 1910 was to ensure that a plaintiff could bring a FELA suit in "the state in which he regularly resides" so he would not have to "travel far from home to bring suit against the railroad." Pet. App. 14a; see Br. in Opp. 18-20. As an initial matter, such a reading of Section 56 would not assist respondents; neither of them is a Montana resident. Pet. App. 3a, 48a. In any event, the argument is mistaken, because Section 56 says nothing about the residence of the *plaintiff*. See 45 U.S.C. 56. The venue provision (which does not address personal jurisdiction) refers only to places where the *defendant* resides or is doing business (or where the cause of action arose).

Indeed, a proposal was made in 1910 to permit a plaintiff to bring suit in "the district of the residence of either the plaintiff or the defendant," the district where the cause of action arose, or the district where the defendant may be found. *Kepner*, 314 U.S. at 50 (citation omitted). But Congress rejected that proposal, apparently over concern that "so wide a choice might result in injustice to the carrier." *Ibid.*; see 45 Cong. Rec. at 2253 (statement of Rep. Sterling); 45 Cong. Rec. at 2257 (statement of Rep. Burke). A similar proposal was considered and rejected in 1947. See H.R. 1639, 80th Cong., 1st Sess. 1-2; see also *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 386-387 (1953) (recounting history of that proposal in the House and Senate). And those proposals addressed only venue, not personal jurisdiction.

The Montana Supreme Court also relied (Pet. App. 7a) on a statement by Senator Borah, who described the 1910 venue amendment as "enabl[ing] the plaintiff

to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." 45 Cong. Rec. at 4034. That description was accurate so far as it addressed venue. But Senator Borah was not purporting to address personal jurisdiction; he described the issue as one of "venue," both in the floor debate, *ibid.*, and in the Senate Report (which he authored), Senate Report 1, 3-4.

Relatedly, the Montana Supreme Court premised its statutory holding on the proposition that the FELA should be liberally interpreted in order to benefit injured railroad workers. Pet. App. 5a, 14a. Although that proposition could have force in cases of statutory ambiguity, here Section 56's text and history refute the suggestion that Congress intended in Section 56 to override the regular rules for service of process in the state courts. Accordingly, nothing in the drafting history of Section 56 suggests that Congress intended to authorize state courts to exercise personal jurisdiction over FELA defendants in any States where they do business.

C. This Court's Decisions Do Not Hold That Section 56 Affirmatively Authorizes A State Court To Exercise Personal Jurisdiction Over A Defendant Doing Business In The State

1. The Montana Supreme Court read four decisions of this Court as supporting its statutory interpretation. Pet. App. 6a-9a, 12a-13a. None of those decisions held that Section 56 itself authorizes a state court to exercise personal jurisdiction over a defendant doing business in the State.

a. In *Denver & Rio Grande Western Railroad* v. *Terte*, 284 U.S. 284 (1932) (cited at Pet. App. 12a-13a),

the Court considered whether two railroads could be sued in Missouri state court under the FELA when the plaintiff was injured in Colorado and neither railroad was incorporated in Missouri. 284 U.S. at 285-286. The railroads' argument was premised on the Commerce Clause; they argued (under then-applicable precedent) that the Missouri suit would unduly burden interstate commerce. *Id.* at 285. This Court agreed with respect to the Rio Grande railroad (which was not doing business in Missouri) but disagreed with respect to the Santa Fe railroad (which was doing business in Missouri). *Id.* at 286-287. The Court grounded its holding on two Commerce Clause decisions—*Hoffman* v. *Missouri ex rel. Foraker*, 274 U.S. 21 (1927), and *Michigan Central Railroad* v. *Mix*, 278 U.S. 492 (1929)—not on an interpretation of Section 56. See *Terte*, 284 U.S. at 287.

The Court noted that the railroads had made a second argument in the state court in *Terte*: that permitting the Missouri suit to proceed would violate their Fourteenth Amendment due-process rights. See 284 U.S. at 285. But the Court did not separately address that argument in its opinion.[6] Rather, its holding that "Santa Fe was properly sued in Jackson County" was based on "the doctrine approved in * * * *Foraker*," a Commerce Clause case. *Id.* at 287. Moreover, even if the Court's decision were read to reject Santa Fe's due-process objection to the suit (under then-prevailing

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[6] The due-process issue was not included in the questions presented in the certiorari petition in *Terte*. See Pet. at 6-8, *Terte*, *supra* (No. 130). Although petitioners addressed the due-process issue elsewhere in their petition, see *id.* at 9, 17-20, respondent contended that the issue was not properly before the Court, see Br. in Opp. at 21-22, *Terte*, *supra* (No. 130).

due-process standards), it would not stand for the proposition that the FELA affirmatively authorizes a state court to exercise personal jurisdiction over a defendant doing business in the State, because the Court said nothing about Section 56.

b. *Baltimore & Ohio Railroad* v. *Kepner*, *supra* (cited at Pet. App. 6a-7a, 12a), likewise does not support the Montana Supreme Court's holding. The question in *Kepner* was whether a state court could invoke its general equitable powers to enjoin a FELA suit brought in federal court in a different State on the ground that the federal suit was inconvenient to the railroad. 314 U.S. at 47. The Court said no. It explained that Section 56 expressly provides for venue in the specified federal district courts, *id.* at 49-50, 52, and concluded that a state court may not override that provision, *id.* at 53-54.

The Montana Supreme Court relied on *Kepner*'s statement that Section 56 permits a plaintiff "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action." Pet. App. 7a (quoting *Kepner*, 314 U.S. at 50, which in turn quoted 45 Cong. Rec. at 4034 (statement of Sen. Borah)). But the context makes clear that the Court was referring only to venue. *Kepner*, 314 U.S. at 49, 50, 52, 53, 54 (consistently defining the issue as one of "venue"). The Court's opinion said nothing about the separate question of personal jurisdiction.

c. The same is true of the Court's decision in *Miles* v. *Illinois Central Railroad*, 315 U.S. 698 (1942) (cited at Pet. App. 7a-9a). *Miles* addressed whether a state court could invoke its equitable powers to enjoin a FELA suit brought in a different state court on inconvenience grounds. 315 U.S. at 699. This Court said

no, explaining that Section 56 authorizes concurrent state and federal jurisdiction over FELA cases, and so plaintiffs have a "right to sue in state courts of proper venue where their jurisdiction is adequate." *Id.* at 704. Again, the Court's opinion referred repeatedly to venue, *e.g.*, *id.* at 701, 702, 703, 704, and did not address personal jurisdiction.

The Montana Supreme Court relied on the *Miles* Court's statement that "Congress has * * * permit-t[ed] suits in state courts, despite the incidental burden, where process may be obtained on a defendant" doing business in those States. Pet. App. 9a (quoting *Miles*, 315 U.S. at 702). That language was dicta: it concerned a Commerce Clause objection that the Court said was not actually presented in the case. *Miles*, 315 U.S. at 701-702. Further, the Court did not say that Section 56 authorizes state court assertions of personal jurisdiction. To the contrary: it said that a plaintiff may bring a FELA suit "where process may be obtained," *id.* at 702, *i.e.*, where state law permits service of process.

d. *Pope* v. *Atlantic Coast Line Railroad*, *supra*, raised essentially the same issue as *Miles*. The railroad argued that one state court should be permitted to enjoin a FELA action brought in another state court because, following the enactment of 28 U.S.C. 1404(a) in 1948, one federal district court could transfer a FELA case to another federal district court. 345 U.S. at 381, 383. This Court disagreed, explaining that Section 1404(a) "does not speak to state courts," and so the holding of *Miles* applied. *Id.* at 383-384. Again, the Court said nothing about personal jurisdiction.

The Montana Supreme Court relied on *Pope*'s statement that Section 56 "establishes a [plaintiff's] right

to sue in Alabama" because the defendant railroad did business there. Pet. App. 8a (quoting *Pope*, 345 U.S. at 383). But that discussion (which cited *Miles*) was about how a plaintiff has a right to proceed in state court under the FELA, not about the state courts' service-of-process authority. *Pope*, 345 U.S. at 383.

2. To the extent that this Court's FELA cases address service of process, they support the conclusion that the FELA was not intended to override state procedural rules. In the *Second Employers' Liability Cases*, the Court stated that in enacting the FELA, Congress was not "attempt[ing] * * * to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." 223 U.S. at 56. Similarly, in *Miles*, the Court noted that a FELA plaintiff may bring suit in state court "where process may be obtained on a defendant," 315 U.S. at 702—not that the FELA itself authorized or provided for such process.

It is true that three of the decisions discussed above (*Terte*, *Miles*, and *Pope*) concerned FELA suits brought in state court in States where railroads were doing business but were not incorporated or headquartered. See *Pope*, 345 U.S. at 380-381; *Miles*, 315 U.S. at 699-700; *Terte*, 284 U.S. at 285-286; see also *McKnett* v. *St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 230, 233-234 (1934) (cited at Br. in Opp. 16). The Montana Supreme Court relied on that fact as evidence that this Court understood Section 56 itself to authorize the state courts' exercises of personal jurisdiction in those cases. See Pet. App. 8a-9a, 12a-13a. But none of those cases held that Section 56 authorizes state courts to exercise personal jurisdiction, and the Court's failure to address personal jurisdiction is hardly telling, especially

because personal jurisdiction is a waivable defense. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (no weight given to "drive-by jurisdictional rulings").

It may well be that the Court in those cases believed that a state court hearing a FELA case could exercise personal jurisdiction over a defendant railroad doing business in the State. But that does not mean that the Court was of the view that Section 56, as opposed to state law, made the defendant amenable to summons. The decisions therefore do not support the Montana Supreme Court's reading of Section 56.

D. Montana Law, Not The FELA, Is The Source Of The Montana Courts' Authority To Assert Personal Jurisdiction Over Petitioner In This Case

Because the FELA does not itself authorize a state court to exercise personal jurisdiction over a defendant, the question becomes whether state law makes petitioner "amenab[le] to service of summons" (*Omni*, 484 U.S. at 104) in this case.

Montana's long-arm statute provides that a state court may exercise general jurisdiction over "[a]ll persons found within the state of Montana," Mont. R. Civ. P. 4(b)(1), and it defines "person" to include a "corporation," Mont. R. Civ. P. 4(a)(3). The Montana Supreme Court has held that a non-resident defendant is "found within" the State of Montana when it is "physically present in the state" or has "contacts with the state [that] are so pervasive that the party may be deemed to be physically present within the state." *Tackett* v. *Duncan*, 334 P.3d 920, 925 (2014). The Montana Supreme Court found that standard met in this

case. Pet. App. 16a-17a. Petitioner does not challenge that state-law holding.[7]

Because state law (rather than federal law) made petitioner amenable to service of summons in this case, the relevant constitutional limits on the courts' exercise of personal jurisdiction over petitioner are supplied by the Due Process Clause of the Fourteenth Amendment. See *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 753 (2014). Accordingly, the remaining question, discussed below, is whether the state courts' assertion of personal jurisdiction over petitioner pursuant to the state long-arm statute violates due process under the Fourteenth Amendment.

II. THE MONTANA COURTS' ASSERTION OF GENERAL PERSONAL JURISDICTION OVER PETITIONER BASED ON THE STATE LONG-ARM STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The second requirement that must be satisfied for a court to exercise personal jurisdiction over a defendant is that such exercise must comport with due process. This Court's decisions in *Goodyear* and *Daim-*

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[7] For FELA cases brought in federal court, service of process generally is addressed by Federal Rule of Civil Procedure 4(k)(1)(A), which supplies the default rule for cases in which Congress has provided a federal cause of action but has not provided a special service-of-process rule. It limits the federal district court's exercise of personal jurisdiction to "the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Accordingly, had this case been brought in federal district court in Montana, Montana's long-arm statute would have supplied the basis for exercising personal jurisdiction over the petitioner. See *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 753 (2014).

ler set out the standards for determining when a state court's exercise of general personal jurisdiction satisfies due process. Applying those standards in this case, the Montana courts' exercise of personal jurisdiction over petitioner violates due process because petitioner is not incorporated in Montana, does not have its principal place of business in Montana, and is not otherwise essentially at home in Montana.

A. *Goodyear* And *Daimler* Define The Due-Process Constraints On State Courts' Exercise Of General Personal Jurisdiction Over Out-Of-State Defendants

1. A court's assertion of personal jurisdiction over a defendant "make[s] binding a judgment *in personam* against an individual or corporate defendant." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). As a general matter, due process requires that a defendant "not present within the territory of the forum" have "certain minimum contacts with" the forum so that the assertion of personal jurisdiction is consistent with "traditional notions of fair play and substantial justice." *Id.* at 316 (citation omitted). That limitation on a court's authority "protects [a defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-472 (1985) (citation and internal quotation marks omitted). That protection in turn allows potential defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

In discussing the types of contacts that may permit a forum to exercise personal jurisdiction over a de-

fendant, the Court has distinguished between "specific jurisdiction" and "general jurisdiction." *Daimler*, 134 S. Ct. at 754 (citation omitted). Specific jurisdiction is the exercise of personal jurisdiction over a defendant "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984). General jurisdiction, or all-purpose jurisdiction, is an exercise of personal jurisdiction over a defendant because of the defendant's connection to the forum. *Id.* at 414 n.9. In recent years, specific jurisdiction "has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Daimler*, 134 S. Ct. at 755 (brackets in original) (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 925 (2011)).

This case involves an exercise of general personal jurisdiction. See Pet. App. 2a, 19a. A state court may exercise general, all-purpose jurisdiction over an out-of-state defendant when the defendant's "affiliations with the State are so continuous and systematic as to render [the defendant] essentially at home in the forum State." *Goodyear*, 564 U.S. at 919 (internal quotation marks omitted). For a corporation, the "paradigm all-purpose forums"—the places the corporation is "at home"—are its "place of incorporation and principal place of business." *Daimler*, 134 S. Ct. at 760; see *Goodyear*, 564 U.S. at 924. Those places are "unique" and "easily ascertainable," and they "afford plaintiffs recourse to at least one clear and certain forum." *Daimler*, 134 S. Ct. at 760. But the Court acknowledged that, in an "exceptional case," a corporation's operations in a forum other than its place of incorporation or principal place of business "may be so

substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n.19.

2. The Montana Supreme Court did not find that petitioner is at home in Montana under the Fourteenth Amendment standards set out in *Goodyear* and *Daimler*.[8] Instead, the court deemed those standards inapplicable for a number of reasons, none of which has merit.

First, the Montana Supreme Court stated that *Goodyear* and *Daimler* "did not involve a FELA claim or a railroad defendant," and concluded that this Court's FELA cases establish that "railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet. App. 11a-12a. The court's analysis confuses the statutory question (whether the FELA itself affirmatively authorizes a state court to exercise personal jurisdiction) and the constitutional question (whether such an exercise violates due process). As explained above, the Montana Supreme Court was wrong on the statutory question; this Court's cases do not hold that the FELA authorizes service of process in state courts. See pp. 18-23, *supra*. But even if they did, that would not answer the separate due-process question. The cited decisions do not address due process, see *ibid.*; and such a decision would be of limited utility because the Court applied a different due-process standard at the time those cases were decided, see *Daimler*, 134 S. Ct. at 761 n.18.

Second, and relatedly, the Montana Supreme Court suggested that *Goodyear* and *Daimler* are inapposite

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[8] There was "no dispute" in the courts below that petitioner's "affiliations with Montana are not so substantial as to render it essentially 'at home' in th[e] State." Pet. App. 23a (McKinnon, J., dissenting); see *id.* at 25a, 32a-33a (McKinnon, J., dissenting).

because they are Fourteenth Amendment cases, and this case involves an assertion of congressional power. Pet. App. 12a. But as explained above, the FELA does not address service of process in state courts, and so this case concerns an exercise of state power, rather than federal power. See pp. 8-24, *supra*; see also pp. 31-33, *infra* (explaining that there is no Fifth Amendment due-process issue in this case). Because the Montana courts are exercising only "the State's coercive power," the relevant limitation is "the Fourteenth Amendment's Due Process Clause." *Goodyear*, 564 U.S. at 918.

Third, the Montana Supreme Court noted that the facts of *Daimler* involved a foreign corporation and petitioner is a domestic corporation. Pet. App. 11a. But the Court's statement of its Fourteenth Amendment due-process holding applies to domestic corporations as well: "A court may assert general jurisdiction over foreign (*sister-state* or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919 (emphasis added); see *Daimler*, 134 S. Ct. at 754. Further, the Court's reasoning does not depend on whether the corporation is foreign or domestic; it depends on the corporation's affiliations with the State. The point is that, without contacts sufficient to make the corporation at home in the State, it would be unfair to make the corporation answer for any and all claims against it in the State's courts. *Daimler*, 134 S. Ct. at 751; *Goodyear*, 564 U.S. at 918-919.

Finally, respondents suggest (Br. in Opp. 8-9) that *Daimler* is "beside the point" because the Montana

Supreme Court limited its holding to FELA claims and "did *not* hold that Montana state courts could exercise general jurisdiction" over petitioner. But the Montana Supreme Court stated its holding in terms of "general personal jurisdiction," Pet. App. 2a, 19a; see *id.* at 38a ("Plaintiff asserts that Montana has general, all-purpose jurisdiction of Defendant."), and it did not purport to analyze specific personal jurisdiction.[9]

B. The Montana Courts' Exercise Of General Personal Jurisdiction Over Petitioner Violates Due Process

1. The Montana courts' exercise of general personal jurisdiction over petitioner violates the Due Process Clause of the Fourteenth Amendment under the standards set out in *Goodyear* and *Daimler*. Petitioner is incorporated in Delaware. Pet. App. 3a, 39a. Petitioner's principal place of business (including its corporate headquarters) is in Texas. *Id.* at 39a. Petitioner is at home, and therefore subject to exercises of general personal jurisdiction, in those two States. *Daimler*, 134 S. Ct. at 760.

This is not an "exceptional case" (*Daimler*, 134 S. Ct. at 761 n.19) in which a corporation may be considered at home in a place other than its place of incorporation or principal place of business. This case, for example, is not like *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) (discussed in *Daimler*, 134 S. Ct. at 755-756), where a company incorporated in

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[9] The injured workers in this case did not reside in or work for petitioner in Montana. Accordingly, this case presents no question of whether a state court could exercise personal jurisdiction over a railroad if the State was the employee's place of residence and principal place of work in his ongoing employment relationship with the railroad, based on a work-related injury incurred while the employee was on assignment out of the State.

the Philippines temporarily moved its principal place of business to Ohio as a result of the Japanese occupation of the Philippines during World War II, *id.* at 447-448. Under those circumstances, the Court concluded that Ohio courts could exercise general personal jurisdiction over the company. *Id.* at 446-448. Here, unlike in *Perkins*, petitioner's principal place of business is in Texas, and there is no argument that petitioner has a surrogate headquarters in Montana.

2. The Montana Supreme Court concluded that petitioner is subject to general personal jurisdiction in Montana because it is "doing business" there. Pet. App. 12a. But "doing business" in a State does not make a corporation answerable for any and all claims against it in the State's courts. *Daimler*, 134 S. Ct. at 762. The "general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts," but instead "calls for an appraisal of a [defendant] corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20 (brackets, citation, and internal quotation marks omitted).

Petitioner's affiliations with Montana are not so "constant and pervasive" as to render it essentially at home in the State. *Daimler*, 134 S. Ct. at 751. A comparison to *Daimler* is useful: Daimler's business activities in California were "substantial, continuous, and systematic," *id.* at 761 (citation omitted), generating billions of dollars in sales each year, *id.* at 766-767 (Sotomayor, J., concurring in the judgment). But this Court evaluated Daimler's California contacts in light of its much-larger global operations, *id.* at 762 n.20; noted that Daimler's California sales comprised only 2.4% of its worldwide total, *id.* at 752; and concluded that Daimler was not "at home" in California, *id.* at

762. Here, petitioner has significant and continuous business activities in Montana: it employs over 2100 people; operates over 2000 miles of track; owns real-estate; solicits business; engages in direct advertising; and transports many tons of coal, grain, and petroleum each year. Pet. App. 17a, 63a. But petitioner's operations in some of the other States in which it operates are greater than its Montana operations, and petitioner's Montana operations are a small percentage of its total operations. *Id.* at 17a, 38a, 63a. Petitioner's significant operations in Montana do not render it at home in that State. Accord *Barrett*, 361 Or. at 125; *Dolan*, No. SC95514, 2017 WL 770977, at *3-*5.

The Montana Supreme Court's approach resurrects a due-process standard that this Court has rejected. As this Court has explained, the fact that a corporation "engages in a substantial, continuous, and systematic course of business" in a State is not enough to permit that State's courts to exercise general, all-purpose jurisdiction over that defendant. *Daimler*, 134 S. Ct. at 761 (citation omitted); see *id.* at 762 n.20. The Montana Supreme Court erred in "[d]isregarding" *Goodyear* and *Daimler* in favor of a "formulation that [this Court] rejected." Pet. App. 20a (McKinnon, J., dissenting). When the correct standard is applied, it is clear that subjecting petitioner to general personal jurisdiction in the Montana courts would violate due process.

3. As a plurality of the Court correctly noted in *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873 (2011), "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Id.* at 884. Because the United States is a distinct sovereign, a defendant may have sufficient aggregate contacts with

the Nation as a whole, or the requisite relationship with the United States, for purposes of personal jurisdiction, even though it does not have such contacts or the requisite relationship with a particular State. *Ibid.* Thus, Congress's express constitutional power over and special competence in matters of interstate and foreign commerce, in contrast to the limited and mutually exclusive sovereignty of the several States (see *ibid.*), enables Congress, consistent with the Fifth Amendment, to provide for the exercise of federal judicial power in ways that have no analogue at the state level. As noted above, for example, Congress has enacted numerous federal statutes providing for nationwide service of process in actions in federal court. See pp. 9-10, 12-13, *supra*. As in *Omni*, the Court has "no occasion" in this case to address any Fifth Amendment issues that might arise under such a statute. 484 U.S. at 103 n.5 (quoting *Asahi Metal Indus. Co.* v. *Superior Court of Cal.*, 480 U.S. 102, 113 n.* (1987) (opinion of O'Connor, J.)).

This case raises the additional wrinkle that the Montana Supreme Court interpreted Section 56 to authorize *state* courts to exercise personal jurisdiction over petitioner based on its interstate rail operations and employment relationship with the injured employees. If the FELA in fact did that, it would present additional questions about the nature and manner of exercising Congress's authority under the Commerce Clause to require a railroad engaged in interstate commerce to submit to state-court jurisdiction over such claims, and the due-process constraints on Congress doing so.[10] But there is no need to address

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[10] The Montana Supreme Court did not address whether the due process constraints on a state service-of-process statute differ

any such questions here. Because state law, not the FELA, authorizes the state courts' exercise of personal jurisdiction in this case, the Due Process Clause of the Fourteenth Amendment defines the outer bounds of the state courts' authority. There is no need for this Court to go any further.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

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from the due process constraints on a federal service-of-process statute.

APPENDIX

1. U.S. Const. Amend. XIV provides in pertinent part:

* * * * *

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

2. 45 U.S.C. 51 provides:

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury

or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

3. 45 U.S.C. 56 provides:

Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

4. Fed. R. Civ. P. 4 provides in pertinent part:

Summons

* * * * *

(k) Territorial Limits of Effective Service.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

* * * * *

5. Mont. R. Civ. P. 4 provides in pertinent part

Persons Subject to Jurisdiction; Process; Service.

(a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, a resident of this state, or organized under the laws of this state, includes:

(1) an individual, whether operating in the individual's own name or under a trade name;

(2) an individual's agent or personal representative;

(3) a corporation;

(4) a limited liability company;

(5) a business trust;

(6) an estate;

(7) a trust;

(8) a partnership;

(9) an unincorporated association;

(10) any two or more persons having a joint or common interest or any other legal or commercial entity; and

(11) any other organization given legal status as such under the laws of this state.

(b) Jurisdiction of Persons.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

(A) the transaction of any business within Montana;

(B) the commission of any act resulting in accrual within Montana of a tort action;

(C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;

(D) contracting to insure any person, property, or risk located within Montana at the time of contracting;

(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;

(F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or

(G) acting as personal representative of any estate within Montana.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by Montana courts over any person:

(A) through service of process as herein provided; or

(B) by the voluntary appearance in an action by any person either personally or through an attorney, authorized officer, agent, or employee.

* * * * *

ECORD
AND
RIEF

No. 16-405

FILED
APR - 4 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ of Certiorari
To The Supreme Court of Montana

BRIEF OF *AMICUS CURIAE* ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE* ACADEMY OF RAIL LABOR ATTORNEYS[1]

The Academy of Rail Labor Attorneys ("ARLA") is a professional association of attorneys founded in 1990 whose practices include the representation of injured railroad workers in cases filed under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et. seq.* and the federal railroad whistleblower law, 49 U.S.C. § 20109. ARLA's primary purposes are to promote rail safety for the traveling public, to promote safe working conditions and standards for railroad employees, to promote public safety with respect to rail transportation at grade crossings and in connection with rail passenger and commuter service, to promote the rendering of whatever aid, comfort or assistance may be required by an injured railroad employee or his or her family, to provide continuing legal education for ARLA's members through seminars and other educational programs, and to promote and maintain high standards of professional ethics, competency and demeanor in the bench and bar.

SUMMARY OF ARGUMENT

1. It is noteworthy that in only a few cases in almost 100 years since 45 U.S.C. § 56 was enacted, has a railroad even questioned before this Court that the section did not meet due process requirements for

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed consents to the filing of *amicus* briefs.

personal jurisdiction in a state court. In such cases, this Court concluded that railroads were subject to personal jurisdiction in a state court where the railroad is transacting business.

Regarding 45 U.S.C. § 56, ARLA fully supports the arguments set forth by Respondents. Alternatively, we believe that this Court, also, may decide this case based upon the principle that this Court will examine the statute with reference to the common law at the time section 56 was enacted. Based upon the state of the law when § 56 was enacted in 1910, this is a valid reason why it was not necessary for Congress to specifically address personal jurisdiction in state courts by amending this aspect of common law in the FELA. Except as abrogated by Congress in the FELA, common law should govern its interpretation, including personal jurisdiction, as it existed when the law was enacted.

2. If this Court adopts the position of BNSF, it will create chaos in the railroad industry, and the only realistic forum for a FELA plaintiff would be the location of the accident. That would be so, even though it could be up to 1000 miles away from the home of a maintenance of way employee, or several hundred miles away for an operating crew. For an operating crew, his/her schedule depends on how far the crew can operate a train within 12 hours. As pointed out by the Federal Railroad Administration in a 2006 study, some maintenance of way employees, many times, travel distances of up to 1000 miles to reach their worksite.

The BNSF Railroad is incorporated in Delaware and operates in 28 states and the British Columbia,

with its principal offices located in Ft. Worth, TX. It would place an unconscionable burden on these BNSF employees to be forced to file the FELA claim far distances away, or in Delaware (state of incorporation), or Ft. Worth (principal place of business). It is even more burdensome in that BNSF doesn't even operate in Delaware. Accidents involving operating road crews and maintenance of way production crews rarely occur near the crew member's home terminal. In most cases, the witnesses of railroad employee accidents/incidents are members of the same crew as the injured employee. And these crew members, likely, live in the same general area as the injured co-worker. Except for initial emergency treatment, the medical witnesses are located near the injured person's home. To force the crew members and the treating medical care personnel to travel many miles to a far away court would be ridiculous, and not in the interests of justice.

Moreover, if this Court adopts the position of the railroad, it would place a tremendous burden on a few courts. For example, three of the largest seven Class One railroads in the country, BNSF, Union Pacific, and Kansas City Southern, are incorporated in the state of Delaware. Among these three railroads, during the past three calendar years, there were 5,109 casualties to on duty railroad employees. Each casualty is a potential FELA case. If the lawsuits were brought in Delaware, it would overly burden one particular state court, located in Kent County. There are three counties in Delaware, and only Kent County courts allow court costs to be assessed against the losing party. Therefore, the FELA lawsuits would likely be brought there.

3. Beginning with the Magna Carta, fairness is the fundamental basis of the Constitution and the Bill of Rights. Fairness cannot be accomplished if the railroad's position is adopted.

Congress, in adopting the 45 U.S.C. § 56, took into consideration constitutional due process. In establishing the statutory jurisdiction over railroads in FELA cases, Congress recognized the uniqueness of railroad operations, and the unfairness of requiring injured railroad employees to bring lawsuits only where the railroad is incorporated or at its principal place of business. It contemplated the due process concerns, and enacted the rights of employees in order to eliminate the necessity of courts from addressing these rights each time a case was filed.

The legislative history clearly supports that a FELA case may be brought wherever the railroad is doing business. In the House Report, it states:

> . . . to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting their case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist.

The fact that the law as to personal jurisdiction may have changed over time should not have any impact on how the FELA is interpreted today. This Court should be guided by the state of the law when FELA was enacted. At the time of enactment of the FELA, a corporation could be sued in any forum where it owned property or does business.

In several cases, this Court has approved the above statutory provision by allowing the FELA plaintiff to sue the corporation at any point or place or state where it is actually carrying on business, and Congress rejected proposals to limit such jurisdiction.

ARGUMENT

I. TO ADOPT THE RAILROAD'S POSITION, WOULD CREATE CHAOS IN THE INDUSTRY.

1. It is noteworthy that in only a couple of cases in over 100 years since 45 U.S.C. § 56 was enacted, has a railroad even questioned before this Court that the section did not meet due process requirements for personal jurisdiction. In these cases, soon after enactment of 45 U.S.C. § 56, this Court concluded that railroads were subject to personal jurisdiction in a state court where the railroad is transacting business. This Court would have dismissed these cases for lack of jurisdiction, if it determined that the facts did not meet due process requirements. Based upon the state of the law when § 56 was enacted in 1910, this is a valid reason why it was not necessary for Congress to specifically address personal jurisdiction in a state court by amending this aspect of common law in the Federal Employers' Liability Act. Except as abrogated by Congress in the FELA, common law should govern its interpretation, including personal jurisdiction as it existed when the law was enacted.

In *Denver & Rio Grande Western R.R. v. Terte*, 284 U.S. 284 (1932), this Court held that a court of a state where a foreign railroad corporation is authorized to do business, owns and operates part of its lines, maintains an office, and has agents for the transaction of

its general business has jurisdiction of a suit against the company in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another state when he was residing there. *Id.* at 287. In *St. Louis Southwestern Ry., v. Alexander*, 227 U.S. 218, 226 (1913), this Court said "A long line of decisions in this Court has established that, in order to render a corporation amendable to service of process in a foreign jurisdiction, it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof." (citations omitted.). The railroad had offices in New York, which this Court deemed sufficient for personal jurisdiction over it. *See also, Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917), where this Court held that a railroad which did not own or operate any part of its railway or holding other property within the state may not be said to be doing business there. *Id.* at 265. This is a further reason why it was not necessary for Congress to specifically address personal jurisdiction by amending this aspect of common law in the FELA. Still, we believe that 45 U.S.C. § 56 is broad enough to encompass personal jurisdiction. *See, infra* 13.

If this Court felt that § 56 was not sufficient to provide personal jurisdiction, it would have so stated in the above decisions. The United States, in its *amicus* brief at 9-13, argues that failure of Congress to provide for service of process in § 56 means that a railroad is not subject to personal jurisdiction in the state courts. Based upon the cases decided by this Court as to personal jurisdiction over railroads, that argument is invalid.

2. Some background information about the potential impact of following the BNSF's position is relevant. The BNSF argues FELA lawsuits against it should be filed only where an accident occurred, where the railroad is incorporated, or the location of its principal place of business. (Pet. Br. 18). As addressed herein, if the railroad's position is adopted, the only realistic forum for a FELA plaintiff would be the location of the accident. That would be so, even though it could be up to 1000 miles away from the home of a maintenance of way employee, or several hundred miles away for an operating crew. For an operating crew, it depends on how far the crew can operate a train within 12 hours.[2] The railroad is incorporated in Delaware and operates in 28 states and the British Columbia, with its principal offices located in Ft. Worth, TX. It has over 32,500 miles of track in the U.S. and Canada (Pet. Br. 9). The BNSF system is divided into various divisions, each covering several states. The significance of the divisions is that operating crews may perform services throughout a division on any particular day. For example, an interdivisional run on the BNSF can cover up to 300 miles.

The job duties of operating employees and maintenance of way employees frequently require them to travel hundreds of miles away from their homes. As pointed out by the Federal Railroad Administration in a 2006 study,[3] some maintenance of way employ-

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[2] The Federal Hours of Service Act limits a railroad operating crew from performing services more than 12 hours in a shift. 49 U.S.C. § 21103.

[3] Final Report, *Work Schedules and Sleep Patterns of Railroad Maintenance of Way Workers* , Federal Railroad Admin-

ees, many times, travel distances of up to 1000 miles to reach their worksite. *Id.* at 7. This requirement resulted from a decision of Presidential Emergency Board 291 in 1991, which allowed railroads to utilize track construction crews system wide. Even non-construction crews (which perform inspection, maintenance, and repair work) job territory may encompass several hundred miles. *Id.* at 8. Previously, construction crews were assigned to a specific geographic region. *Id.* at 7. The Report also pointed out that travel by a maintenance of way employee is usually done on his/her day off "because it requires substantial time that cannot be accommodated on a workday." *Id.* at 26. It would place an unconscionable burden on these BNSF employees to be forced to file the FELA claim far distances away, or in Delaware (state of incorporation) or Ft. Worth (principal place of business). It is even more burdensome in that BNSF doesn't even operate in Delaware.

There are demonstrable burdens in restricting the forum as BNSF seeks. Accidents involving operating road crews and maintenance of way production crews rarely occur near the crew member's home terminal. In most cases, the witnesses of railroad employee accidents/ incidents are members of the same crew as the injured employee. And these crew members, likely, live in the same general area as the injured co-worker. Except for initial emergency treatment, the medical witnesses are located near the injured person's home. To require the crew members and the treating medical care personnel to travel

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istration, Office of Research and Development, DOT/FRA/ ORD-06/25 (December 2006).

many miles to a far away court would be ridiculous, and not in the interests of justice.

Another practical problem exists in determining the location of a railroad's "principal place of business". For example, AMTRAK's business offices are located in Washington, D.C., but its dispatching facilities are in Philadelphia. Various railroads operate this way.

3. Moreover, if this Court adopts the position of the railroad, it would place a tremendous burden on a few courts. For example, three of the largest seven Class one railroads in the country, BNSF, Union Pacific, and Kansas City Southern, are incorporated in the state of Delaware. Among these three railroads, during the past three calendar years, there were 5,109 casualties to on duty railroad employees.[4] Each casualty is a potential FELA case.[5] If the lawsuits were brought in Delaware, it would overly burden one particular state court, located in Kent County. There are three counties in Delaware, and only Kent County courts allow court costs to be assessed against the losing party. Therefore, the FELA lawsuits would likely be brought there.

The Norfolk Southern Railroad demonstrates another example of placing an undue burden on local courts. During the past three calendar years, there were 1,048 casualties on the railroad. Norfolk Southern is incorporated in Virginia, and its principal place of business is located in Norfolk, Virginia. The poten-

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[4] Source: Federal Railroad Administration, Office of Safety Analysis, 2.04 "Employee on Duty Casualties."

[5] The statute of limitations for a FELA case is three years.

tial burden on Virginia's courts, as well as other courts, cannot be disregarded.

4. ARLA agrees with the Respondents that there is personal jurisdiction over BNSF under this Court's existing due process jurisprudence. However, in view of the above practical problems which would be encountered by the railroad's position, we request that this Court revisit fairness under the due process clause. As Justice Sotomayor stated in her concurring opinion in *Daimler AG v. Bauman*, 134 S. Ct. 746, 768 (2014), the concept of reciprocal fairness is the touchstone principle of due process in this field. A historical perspective is relevant in making this Court's determination in the present case. The cornerstone of the 5th Amendment and the 14th Amendment protection of due process is fairness. Beginning with the eight centuries' old Magna Carta, which encompassed due process, fairness is the fundamental basis of the Constitution and the Bill of Rights. In an opinion by Justice Joseph Story, this Court first cited the Magna Carta in 1819, in *The Bank of Columbia v. Okely*, 17 U.S. 235, with numerous references of Magna Carta in subsequent opinions. Justice Story later pointed out in one of his commentaries that the guarantee of due process is "but an enlargement of the language of the Magna Carta."[6] Fairness was the reason that the Magna Carta was established. It was developed to protect persons from the tyranny during King John's reign. In 1354, during King Edward III's reign, the phrase "due process of law" first appeared in the Magna Carta's

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[6] Book III, *Commentaries on the Constitution of the United States*, Vol. 2 § 1789, 534 (1873).

guarantee of certain freedoms. Of course, the issue of whether a railroad must be sued only where the accident/incident arose, where the railroad is incorporated, or at its principal place of business, did not arise until recent years.

The Federalist papers embody the same principles of fairness as set forth in the Magna Carta. In discussing due process in the Federalist Paper No. 84, Alexander Hamilton did not specifically mention procedural due process. However, it centered upon fairness. As stated in *U.S. v. Wong Kim Ark*, 169 U.S. 649, 654 (1898), "The language of the Constitution, as has been well said, could not be understood without reference to the common law." *See also*, *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 343 (1931). In the FELA context, this Court applied the common law negligence principles in deciding *Norfolk Southern Ry. v. Sorrell*, 548 U.S. 158, 166 (2007). In a Congressional Research Service report for Congress, *Statutory Interpretation: General Principles and Recent Trends*, Order No. 97-589 (Dec. 19, 2011), it pointed out that "Congress is presumed to legislate with knowledge of existing common law. When it adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise." p. 19. Additionally, "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Id.*

This Court has long recognized that procedural due process is based upon fundamental fairness. In

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), this Court emphasized that state court jurisdiction over absent defendants is whether the exercise "offends notions of fair play and substantial justice." In *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), it held that due process is violated ". . . if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." And this Court has noted that the due process test includes administrative burdens that the additional or substitute procedural requirements would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), (cited with approval in *Wilkinson v. Austin*, 545 U.S. 209, 211 (2005)). *See also*, *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); *Daniels v. Williams*, 474 U.S. 327, 331-2 (1986).

Personal jurisdiction over BNSF, in the various states where it operates, does not create any significant burdens on the railroad, when balanced against the burdens on some courts and plaintiffs [as discussed, *supra*, at 5]. The railroad has significant continuous and systematic contacts with the state, so as to render it essentially at home in Montana. *See*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

In situations where the railroad has significant operations within a particular state, it would be unfair to require plaintiffs to travel many miles to file a FELA action. There is no real contest, when balancing the fairness between the costs and burdens to an individual railroad worker, versus the limited costs and burdens of a railroad to be sued where the railroad con-

ducts its operations.[7] In fact, in many cases, because of the location of witnesses, it would be a greater burden on the BNSF for a lawsuit to be filed in Delaware or Ft. Worth, Texas. Modern transportation and communications make it much less burdensome on a railroad to be sued where it has substantial operations.

II. THE APPLICABLE STATUTE IS CLEAR AS TO THE STATE'S TRIAL COURTS' JURISDICTION.

Congress, in establishing the statutory jurisdiction over railroads in FELA cases, recognized the uniqueness of railroad operations, and the unfairness of requiring injured railroad employees to bring lawsuits only where the railroad is incorporated or at its principal place of business. The text and purpose of the law contemplated the due process concerns, and enacted the rights of employees in order to eliminate the necessity of courts from addressing these rights each time a case was filed.

The applicable jurisdictional statute is set forth at 45 U.S.C. § 56, which states:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the

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[7] We recognize the decision in *Walden v. Fiore*, 134 S. Ct. 1115 (2014) that focuses on the contacts of the defendant with the forum state. However, we believe that the fairness to all parties is relevant in determining due process.

United States under this chapter shall be concurrent with that of the several states.

Obviously, a statute cannot violate due process standards. However, in the present case, the statute encompasses due process because of the fairness imposed therein. A principal canon of statutory construction is that a statute will be given a constitutional interpretation when possible. *U. S. v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). *See also, Statutory Interpretation: General Principles and Recent Trends, supra*, at 23.

The BNSF Railroad is, and was, continuously and systematically doing business within the jurisdiction of Montana at the time of commencement of this action. The railroad cannot validly dispute this fact. Moreover, the railroad receives substantial benefits from the state, and its burden of litigating within Montana is small. The legislative history of this section of the code emphasizes the congressional intent to protect the injured employee from the undue burden of forcing him/her to seek recovery in a court many miles away from the plaintiff's home. Fairness is reflected throughout the congressional consideration of 45 U.S.C. § 56, and meets the due process requirements.

III. THE LEGISLATIVE HISTORY OF 45 U.S.C. § 56 MAKES IT CLEAR THAT THE STATE'S TRIAL COURT IS VESTED WITH PERSONAL JURISDICTION IN THE PENDING CASE.

In 1910, both the House and Senate proposed amendments to the FELA which would allow plaintiffs to bring actions where the railroad defendant's

contacts within a state were continuous and systematic. The amendment proposed by the House Committee on the Judiciary contained different language than the Senate version. It provided that the lawsuit could be brought in the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, "or in which the defendant shall be found at the time of commencement of the action." H. R. Rep. No. 513, 61st Cong., 2d Sess. 2-3 (1910). The Committee said "So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear." *Id.* at 6. It stated that the amendment is necessary "in order to avoid great inconvenience to suiters and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant'." *Ibid.* Further, it pointed out that

> . . .to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting their case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist.

Id. at 7.

On the present issue before this Court, the Senate Committee on the Judiciary proposed a minor change to the House version. That change was adopted by Congress in 45 U.S.C. § 56. It allows the lawsuit to be brought where the defendant railroad is "doing business", instead of the House version which permitted a lawsuit where the defendant is "found". S. Rep. No. 432, 61st Cong., 2d. Sess. 1 (1910). Also, the Committee

said that the issues have been so thoroughly covered and fully treated that it quoted and adopted fully the discussion in the House committee report. *Id.* at 3-4.

In the Senate floor deliberations, Senator William Borah, Chairman of the Senate Judiciary Committee, further explained the congressional intent:

> The objection which has been made to the existing law, and this objection arises by reason of the decision of some of the courts, is that the plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in certain instances in the district in which the defendant is an inhabitant. In other words, the corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order, under certain conditions, to bring his action against the defendant and come within the terms of the law. So, if this bill should be passed the law will be remedied in that respect, in enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. *The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.*

45 Cong. Rec. 4034 (1910). (Emphasis added).

It follows from this history that a state has personal jurisdiction to allow a FELA plaintiff to sue a railroad wherever it does business. The decision in *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 50 (1941)

is worth repeating, where this Court approved the above language of Senator Borah in allowing the plaintiff to find the corporation at any point or place or state where it is actually carrying on business. *See also, Denver & Rio Grande Western R.R. v. Terte, supra,* 284 U.S. at 286.

While the statute itself does not specifically mention due process, the discussion reflects Congress' concern with due process. Congress granted jurisdiction to any court "in which the defendant shall be doing business at the time of commencing [an action under 45 U.S.C. § 51" because it understood the impediments to accessing the courts faced by FELA plaintiffs in view of the unique interstate nature of railroad employees work. The point of the congressional deliberations is that an employee should not be forced to bring a FELA case many miles away from his/her home.

The BNSF says that § 56 covers only subject matter jurisdiction, not personal jurisdiction. (Pet. Br. 34-40). This Court has never so ruled, and it had more than 100 years to do so in similar FELA cases. There was no need for Congress to specify personal jurisdiction and subject matter jurisdiction in the FELA law. The state of the law at the time of FELA's enactment was that a corporation could be sued in any forum where it owned property. *See, Pennoyer v. Neff,* 95 U.S. 714, 723-24 (1877)[8]; *See also,* Mary

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[8] This Court, in recent cases, has limited the holding of that case as it relates to jurisdiction generally. However, FELA jurisdiction, and congressional intent at the time of enactment should be the governing factor in the present case.

Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 614-15 (1988).

IV. THIS COURT HAS CONSISTENTLY EXAMINED A FEDERAL STATUTE WITH REFERENCE TO THE COMMON LAW AT THE TIME THE STATUTE WAS ENACTED.

The fact that the law as to personal jurisdiction in state courts may have changed over time should not have any impact on how the FELA is interpreted today. This Court should be guided by the law when FELA was enacted. Clearly, there was no intent by Congress to abrogate then existing law as to personal jurisdiction *sub silentio*. Congress relied upon the conditions that the courts had created at the time of FELA's enactment. As stated in *Perrin v. United States*, 444 U.S. 37, 42 (1979), this Court looks "to the ordinary meaning . . . at the time Congress enacted the statute . . . ." This Court has consistently examined a federal statute with reference to the common law at the time the statute was enacted. *Norfolk Southern Ry. v. Sorrell*, *supra*, 549 U.S. at 166 (2007); *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 164 (2003); *Consolidated Rail Corp. v. Gottshall*, *supra*, 512 U.S. at 542, 544; *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330, 336-339 (1988); *Urie v. Thompson*, 337 U. S. 163, 182 (1949). When words used in a statute had a well-settled judicial meaning at the time the statute was enacted, courts presume that the legislature intended to continue the existing interpretation in the statute absent contextual or historical evidence to the contrary. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939); *The Abbotsford*, 98 U.S. 440, 444 (1878).

A fundamental canon of statutory construction is that ". . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). In interpreting this section, the congressional intent to provide wide ranging liberal relief for railroad employees must be taken into account. Furthermore, the FELA authorizes a state to entertain a lawsuit, if the state law allows it. In *Mondue v. N.Y., New Haven & Hartford R.R. (Second Employers' Liability Cases)*, 223 U.S. 1, 59 (1912), this Court said ". . . rights arising under [the FELA] may be enforced, as of right, in the courts of States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

V. THIS COURT HAS APPROVED THE JURISDICTION PURSUANT TO 45 U.S.C. § 56, AND THIS COURT'S RECENT DECISIONS DO NOT NEGATE THOSE § 56 DECISIONS.

This Court has previously rejected the railroads' constitutional jurisdictional arguments under 45 U.S.C. § 56.[9] In *Baltimore & Ohio R.R. v. Kepner, supra*, this Court held that a railroad employee who was injured in Ohio could bring his FELA case in New York. It stated that 45 U.S.C. § 56 was "deliberately chosen to enable the plaintiff, . . . to find the corporation at any point or place or State where it is

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[9] These cases decided whether the forum chosen by the plaintiff created an undue burden on interstate commerce. There, this Court discussed the unfairness of requiring the plaintiffs to travel many miles to file a case.

actually carrying on business, and there lodge his action . . . ." *Id.* 314 U.S. at 50. In *Miles v. Illinois Central R.R.*, 315 U.S. 698, 702 (1942), this Court pointed out that a FELA lawsuit could be maintained where the railroad is actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction. In *Pope v. Atlantic Coast Line R.R* , 345 U.S. 379 (1953), this Court held that a Georgia resident injured in Georgia could maintain an action in Alabama. It emphasized that a plaintiff could bring an action wherever the railroad is doing business. [10]

BNSF has intentionally obtained various benefits from the state. It sought, and has, authorization to conduct business within the state; there is a BNSF registered agent in the state; it conducts extensive business within the state; it has the right to sue there; and maintains banking in Montana; it operates switching yards and classification yards in the state; it contracts to supply services within the state; purchases products in the state; and its marketing occurs within Montana by soliciting business through salespersons

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[10] In *Pope v. Atlantic Coast Line R.R.*, *Id.* at 386-87, the Court noted that, in 1947, Congress was considering changes to § 56 in view of the *Miles* and *Kepner* cases. The railroads asserted that, as the result of those decisions, the injured employees were left free to abuse their venue rights in distant forums without restriction. The pending bill would have permitted a lawsuit only in the district or county where the plaintiff resided or the accident occurred. The House passed an amendment which would have restricted a state court's jurisdiction. *See*, H.R. Rep. No. 613, 80th Cong., 1st Sess. (1947). However, the Senate Judiciary Committee rejected the amendment, and the proposal was not adopted.

and advertising. It has over 2,000 miles of track in the state, and employs more than 2,000 there. In short, the BNSF avails itself of numerous privileges and benefits within Montana. Because of the above, it should be considered a "home" of the BNSF. *See, Walden v. Fiori, supra,* 134 S. Ct. at 746, 761. BNSF is as much at home in Montana as it is in Texas.

The discussion in a lower court case is worth noting. In *Fraley v. Chesapeake & Ohio Ry.*, 294 F. Supp. 1193, 1203 (W.D. Pa. 1969), the court discussed the congressional intent in a FELA case of allowing venue where the defendant is doing business. It quoted from the *Kepner* and *Miles* cases in finding the legislative history indicates that Congress meant to enable suits to be brought wherever the railroad was operating. The court said that the railroad was not merely soliciting business, but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction, and Congress felt that a plaintiff should be able to sue in any place served by the railroad. Further, the *Fraley* court said that railroads are often multistate corporations operating lengthy rail lines (as is the BNSF in the present case), and this was deemed an undue hardship upon a plaintiff. The court concluded that the plaintiff should be allowed to bring suit wherever rail operations were being conducted.

The BNSF primarily relies upon *Daimler, supra,* and *Goodyear Dunlop Tries Operations, S.A. v. Brown, supra,* to challenge the trial court's jurisdiction in the present case. Those cases are clearly distinguishable on the facts. There, this Court noted that the contacts with the state in each case were too

sporadic (*Goodyear*, *Id.* at 2857), or not so continuous and systematic as to be at home (*Daimler*, *supra*, 134 S. Ct. at 749). In both cases, the defendants were essentially absent from the forum. That certainly is not the true in the present case.

Congress specifically enacted the jurisdiction and venue in FELA litigation. And, as discussed *supra*, at____, as it relates to personal jurisdiction, this Court has approved the validity of 45 U.S.C. § 56. Neither *Daimler* nor *Goodyear* write a new chapter in judicial history, nor did it modify the historic authority of allowing injured railroad employees to enforce their federal FELA rights in courts other than where the railroad is incorporated or has its principal place of business. *See, The Supreme Court, 2013 Term—Leading Cases*, 128 Harv. L. Rev. 311, 316 (Nov. 10, 2014).

The underlying premise of both *Daimler and Goodyear* is that constitutional due process is *fairness*. Certainly, fairness in the present case dictates that the state's trial court retain jurisdiction. Throughout the years, this Court has consistently recognized the importance that Congress attributed to balancing the inequality of the railroads over the employees. In *Lilly v. Grand Trunk Western R.R.*, 317 U.S. 481, 486 (1943), it stated that the Act: ". . . is to be liberally construed in the light of its prime purpose, the protection of employees and others." In *Urie v. Thompson*, 337 U.S. 163, 181-182 (1949), it pointed out FELA's ". . . remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." In *Consolidated Rail Corporation v. Gottshall*, *supra*, 512 U.S. at 542 , it cited the congressional effort in the FELA

to ". . . shift part of the human overhead of doing business from employees to their employers." Also, this Court, once again, recognized Congress' "humanitarian" and "remedial" goals. *Id.* at 542-543, cited, with approval, in *CSX Transportation, Inc. v. McBride*, 564 U.S. 685, 692 (2011).

CONCLUSION

The decision of the Supreme Court of Montana should be affirmed.

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IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRRELL; and ROBERT M. NELSON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Montana

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

Cases

Allied-Bruce Terminix Companies, Inc. v. Dobson,
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Am. Dredging Co. v. Miller,
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AT&T Mobility LLC v. Concepcion,
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Bailey v. Cent. Vermont Ry.,
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Bauman v. DaimlerChrysler AG,
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BNSF Ry. Co. v. Shipley,
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Boyd v. Grand Trunk W. R. Co.,
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Burger King Corp. v. Rudzewicz,
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Burlington N., Inc. v. Flathead Cty.,
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Burlington N., Inc. v. Montana Dep't of Revenue,
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Burlington N., Inc. v. Richland Cty.,
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Burnham v. Superior Court, 4
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Cafeteria & Rest. Workers Union, Local 473 v. McElroy,
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California v. Posey,
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Canada Malting Co. v. Paterson Steamships, Ltd.,
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Carnival Cruise Lines, Inc. v. Shute,
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Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 28

Consol. Rail Corp. v. Gottshall,
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CSX Transp., Inc. v. McBride,
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Daimler AG v. Bauman,
134 S. Ct. 746 (2014) ..... *passim*

Daimler at 756 24

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 34

Denver & Rio Grande W. R.R. Co. v. Terte,
284 U.S. 284 (1932) 9, 10

Dice v. Akron, Canton & Youngstown R.R.,
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Douglas v. N.Y., N.H. & H.R. Co.,
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Gilmer v. Interstate/Johnson Lane Corp.,
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Goodyear Dunlop Tires Operations, S.A. v. Brown,
564 U.S. 915 (2011) ..... *passim*

Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 12

International Shoe Co. v. Washington,
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J. McIntyre Mach., Ltd. v. Nicastro,
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Jett v. Dallas Indep. Sch. Dist.,
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Keeton v. Hustler Magazine, Inc.,
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Kulko v. Super. Ct.,
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Lafayette Ins. Co. v. French,
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Langemo v. Montana Rail Link, Inc.,
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Larson v. Jo Ann Cab Corp.,
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Lincoln Prop. Co. v. Roche,
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Logan v. Zimmerman Brush Co.,
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McKnett v. St. Louis & S.F. Ry. Co.,
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Miles v. Illinois Cent. R.R. Co.,
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Mississippi Pub. Corp. v. Murphree,
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National Bank of N. Am. v. Assocs. of Obstetrics & Female Surgery, Inc.,
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National Equipment Rental, Ltd. v. Szukhent,
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Neirbo Co. v. Bethlehem Shipbuilding Corp.,
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Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.,
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Perkins v. Benguet Consol. Min. Co.,
342 U.S. 437 (1952) 18, 24

Perkins v. First Nat. Bank of Cincinnati,
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Piper Aircraft Co. v. Reyno,
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Pope v. Atl. Coast Line R.R. Co.,
345 U.S. 379 (1953) 9, 10

Robert Mitchell Furniture Co. v. Selden Breck Construction Co.,
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Schwinden v. Burlington N., Inc.,
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Shaffer v. Heitner,
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Simms v. Ruby Tuesday, Inc.,
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St. Clair v. Cox,
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St. Louis & Iron Mountain & Southern Railway Co. v. Taylor,
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Standard Fire Ins. Co. v. Knowles,
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State of Mo. ex rel. S. Ry. Co. v. Mayfield,
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Tauza v. Susquehanna Coal Co.,
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Thigpen v. Roberts,
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Trainmen v. Virginia ex rel. Virginia State Bar,
377 U.S. 1 (1964) 8

Tyrrell v. BNSF Ry. Co.,
373 P.3d 1 (2016) 21

Urie v. Thompson,
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Statutes

45 U.S.C. § 51 *et seq* 7

45 U.S.C. § 56 ..... 9, 28

46 U.S.C. § 30104 35

49 U.S.C. § 10903 *et seq* 26

49 U.S.C. § 11145 25

49 U.S.C. § 11321 *et seq* 26

LA. C.C.P. art. 1734.1 29

Mont. Code Ann. § 35-1-1030(1)-(2) 16

Mont. Code Ann. § 35-1-115 16

Tex. Gov't Code § 101.0611(17) 29

Rules

Fed. R. Civ. P. 26(b)(1) 33

Mont. R. Civ. P. 26(b)(2)(C) 33

Legislative Material

45 Cong. Rec. 4034
61st Cong., 2d Sess. (1910) 8

Other Authorities

4 Charles Alan Wright & Arthur R. Miller,
Federal Practice and Procedure § 1066 (4th ed.) 12

Alfred Hill,
Choice of Law and Jurisdiction in the Supreme Court,
81 Colum. L. Rev. 960, 980 (1981) 14

Black's Law Dictionary (7th ed. 1999) 28

Friedrich K. Juenger,
What's Wrong with Forum Shopping?,
16 Sydney L. Rev. 5 (1994) 28, 30

John Fabian Witt,
Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement,
114 Harv. L. Rev. 690, 694 (2001) 7

Judy M. Cornett & Michael H. Hoffheimer,
Good-Bye Significant Contacts: General Jurisdiction After Daimler AG v. Bauman,
76 Ohio St. L.J. 101 (2015) 23

Lea Brilmayer, et al.,
A General Look at General Jurisdiction,
66 Tex. L. Rev. 721 (1988) 23

Lewis S. Black, Jr.,
Why Corporations Choose Delaware
(Del. Dep't of State, 2007) 22

Lucian Bebchuk, Alma Cohen & Allen Ferrell,
Does the Evidence Favor State Competition in Corporate Law?,
90 Calif. L. Rev. 1775 (2002) 22

Markus Petsche,
What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of A Controversial Practice,
45 Int'l Law. 1005 (2011) 28, 30

Melvin L. Griffith,
The Vindication of a National Public Policy Under the Federal Employers' Liability Act,
18 Law & Contemp. Probs. 160 (1953) 7

Pat Corcoran,
Northwestern and Property Taxes,
The Missoulian (Nov. 14, 2016) 17

Richard Maloy,
Forum Shopping? What's Wrong with That?,
24 QLR 25 (2005) 28, 30

Samuel B. Horovitz,
Assaults and Horseplay Under Workmen's Compensation Laws,
41 Ill. L. Rev. 311 (1946) 8

Scott D. Dyreng, Bradley P. Lindsey & Jacob R. Thornock,
Exploring the Role Delaware Plays as a Domestic Tax Haven,
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Walter Licht,
Working for the Railroad (1983) 7

Walter W. Heiser,
Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart *and* Carnival Cruise,
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Walter W. Heiser,
General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person,
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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury, employment rights, civil rights, and consumer rights litigation. Almost from its inception in 1946, AAJ has included lawyers who have advocated specifically for the rights of injured railroad workers to compensation under the Federal Employers' Liability Act.

AAJ believes that the right to bring a FELA action in any state court where the employer-railroad does business reflects Congress's recognition that workers may be injured wherever the rails may take them. The narrow rule of personal jurisdiction urged by Petitioner in this case would deprive railroad workers of this substantial right.[1]

SUMMARY OF ARGUMENT

Congress enacted the Federal Employers' Liability Act in 1908, responding to an accident crisis that killed and injured hundreds of thousands of railroad workers each year. Congress sought to make railroads more accountable for their negligence, by compensating victims and their families and providing a strong incentive for railroads to adopt

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[1] The parties have consented to the filing of this brief. The undersigned counsel for amicus curiae affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than amicus curiae, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

safer operations. Recognizing that railroad employees can suffer injury wherever the rails take them, Congress amended the FELA in 1910 to permit plaintiffs to sue where the railroad "shall be doing business."

This Court's precedents establish that Congress thereby granted permission to sue in state courts where the carrier conducts operations, and that the statute's broad grant of jurisdiction was not inequitable, oppressive, or fundamentally unfair.

1b. Alternatively, the decision below may be upheld on the basis of consent. Because personal jurisdiction is a right that may be waived, consent was accepted as a basis for state court jurisdiction over foreign corporations prior to this Court' expansion of jurisdiction in *International Shoe,* and even before the adoption of the Fourteenth Amendment. This Court has consistently held that appointment of an agent to receive service of process on behalf of a corporation that actually does business in the state is effective. Historically, courts found that state courts could assert jurisdiction even as to claims not arising out of the corporation's in-state activities.

Consent jurisdiction is not inconsistent with either *International Shoe* or *Daimler*, both of which expressly addressed the assertion of jurisdiction over foreign corporations that had not consented to jurisdiction. Indeed, to hold that consent jurisdiction is no longer viable would be inconsistent with this Court's decisions upholding contractual forum selection provisions and arbitration agreements, which are a species of forum selection clause. A corporation that has consented to state court jurisdiction in order to conduct business in the state

has fair notice that it may be sued there and can plan accordingly.

In this case, BNSF has registered to do business in Montana, has appointed an agent to receive service, and has actually conducted substantial business in the state. BNSF has regularly appeared in Montana courts to protects its own interests in the state.

2a. Petitioner asserts that due process requires that general jurisdiction may only be exercised by state courts in the corporate defendant's state of incorporation or principal place of business. To the contrary, due process is not served by such inflexible jurisdictional rules, but by a fact-based assessment of the fairness of asserting jurisdiction in the particular case. This Court in *Daimler* expressly rejected BNSF's inflexible rule that a corporation can only be subject to general jurisdiction in its state of incorporation and the state of its principal place of business, but instead reaffirmed the more flexible standard set forth in *International Shoe*.

2b. Indeed, limiting general jurisdiction to a corporation's state of incorporation or single principal place of business does not comport with due process. BNSF's argument leans heavily on the "at home" metaphor it garners from this Court's precedents instead of addressing the ultimate question whether it is fundamentally unfair for an injured worker to file a FELA action in the courts of another state in which BNSF conducts substantial railroad activities.

For example, it is difficult to credit BNSF's claim to be "at home," and thus amenable to suit, in its state of incorporation, Delaware, where it conducts

no rail operations, owns no track, and employs no workers. Businesses choose to incorporate in particular states for a variety of reasons that have little to do with their actual business operations, including internal governance laws and tax advantages. Many of the nearly one million corporations that are incorporated in Delaware carry on no business in the state except to maintain a dropbox as a legal address. It cannot be credibly maintained that BNSF is "at home" for suit by an injured railroad worker in Delaware, but not in Montana, where BNSF actually conducts railroading operations.

Similarly, it is not reasonable to assert that BNSF can be "at home" based on its business activities in only one state, its principal place of business. Large companies may engage in activities in several states that may be sufficient to treat the company as "at home" in each. This Court has itself suggested a company may be deemed "at home" in more than one state based on the quantity and nature of its operations and contacts there.

In this case, the court below found that jurisdiction was fair, based on BNSF's extensive business operations in Montana. Significantly those contacts include ownership of over 2,000 miles of track in Montana, a share of BNSF's total track that is a close second to that of Texas. Because BNSF cannot easily sell or abandon its track in Montana, its activities in the state go far beyond ephemeral contacts and constitute a continual and permanent presence.

Additionally, BNSF's Montana contacts are not unrelated to plaintiffs' causes of action. Plaintiffs

allege negligence on the part of BNSF that resulted in injury that is compensable under FELA. BNSF employees working in Montana are likewise covered by FELA and may bring suit against BNSF for the same allegedly negligent practices as are alleged by plaintiffs in this case.

3a. Petitioner's assertion that this Court should combat "forum shopping" provides no support for restricting the exercise of general jurisdiction by state courts. BNSF has neither defined "forum shopping" nor explained how permitting FELA plaintiffs to sue in Montana for injury occurring elsewhere deprives it of due process or substantial justice.

The plaintiff is the master of the complaint and a plaintiff's right to select an advantageous forum is well settled. Railroad workers may be injured far from home so that a state other than the place of injury may offer greater convenience and lesser cost. Representation of FELA plaintiffs is a relatively specialized field, and plaintiff's counsel of choice may practice in another state. One state's procedural rules may allow for more efficient and inexpensive litigation of a particular case. In addition, one state's courts may have greater experience in presiding over FELA cases or have less crowded dockets. The fees required for obtaining a trial by jury, expressly guaranteed to FELA plaintiffs, may be lower in the forum state. Plaintiffs' lawyers would not be fulfilling their legal duties to their clients if they failed to make use of such differences between jurisdictions.

"Forum shopping" that amounts to no more than selection of a forum offering a legitimate advantage to the plaintiff provides no basis for

limiting plaintiff's ability to choose the most favorable forum in which to pursue his or her claim.

3b. In this case, BNSF has failed to establish that allowing plaintiffs to sue in Montana, where BNSF does business, rather than requiring them to sue in Delaware or Texas, or in the state of injury, is fundamentally unfair. For example, Montana's application of FELA's three-year statute of limitations is firmly rooted in this Court's FELA precedents. The fact that some federal courts are perceived to hold a more defendant-friendly interpretation is not relevant to forum shopping among state courts. Moreover, if a state court's interpretation of the federal statute is erroneous, the appropriate vehicle is review by this Court, not restricting the personal jurisdiction of state courts. Similarly, Montana's view of reduction of damages for preexisting conditions is a valid construction of FELA's text which may, if erroneous, be corrected by this Court.

Nor are Montana's discovery practice and evidentiary rules regarding expert testimony unfair to defendants. BNSF's claimed state-federal differences are not relevant to "forum shopping" among state courts.

Montana's rule against *forum non conveniens* motions in FELA cases comports with this Courts decisions leaving such matters to the states. In addition, Montana's *pro hac vice* rule does not unfairly disadvantage a railroad that does substantial business in Montana. Finally, the fact that plaintiffs in this case are not residents of Montana has no bearing on whether Montana's courts may exercise jurisdiction over BNSF.

ARGUMENT

I. A STATE COURT MAY, CONSISTENT WITH DUE PROCESS, ASSERT PERSONAL JURISDICTION OVER A FELA CLAIM ARISING IN ANOTHER STATE, BASED ON DEFENDANT'S SUBSTANTIAL RAIL OPERATIONS IN THE FORUM STATE.

A. FELA Allows Injured Railroad Workers to File Suit Where Their Employer Is Doing Business.

Congress enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* in 1908, following "an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001). Casualties among railroad workers in particular were astronomical. *See generally* Walter Licht, Working for the Railroad 190-200 (1983) and Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). In 1908 alone, 281,645 trainmen were killed or injured. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011).

American courts at that time offered little in the way of justice or compensation for injured workers and their families. AAJ's founder noted that, prior to worker's compensation laws, workers lost approximately 80 percent of their personal injury tort actions against their employers. Samuel B. Horovitz, *Assaults and Horseplay Under Workmen's*

Compensation Laws, 41 Ill. L. Rev. 311, 311 (1946), *cited in Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 361 (Va. 2011). The primary obstacle was judicial application of "harsh and technical common-law rules which sometimes made recovery difficult or even impossible." *Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964). FELA's purpose was most expansively stated by the Senate Committee on the Judiciary in a report accompanying the 1910 amendment to the Act:

> [FELA] places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. . . . It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can . . . "measurably control their causes."[2]

45 Cong. Rec. 4034, 4041, 61st Cong., 2d Sess. (1910).

Thus, as this Court has explained, Congress intended not only "to provide compensation for the injuries and deaths" of railway employees, but also "to encourage employers to improve safety measures in

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[2] The quotation is from *St. Louis & Iron Mountain & Southern Railway Co. v. Taylor*, 210 U. S. 281, 296 (1908), where this Court found no federal constitutional impediment to the courts of Arkansas asserting jurisdiction over a suit for the wrongful death of a railroad worker in the Indian territory (now Oklahoma) against a Missouri corporation. *Id.* at 285.

order to avoid those claims." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 555 (1994).

Consistent with this remedial purpose, Congress in 1910 amended the statute to provide that a plaintiff may bring a FELA action in a district "in which the defendant shall be doing business at the time of commencing such action," and that jurisdiction of the district courts "shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56.

This Court has construed that provision as "permission granted by Congress to sue in state courts . . . where the carrier is found doing business." *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698, 705 (1942). The Montana Supreme Court also relied on *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953), where this Court stated that FELA "establishes petitioner's right to sue in Alabama" for an injury in Georgia or "wherever the carrier 'shall be doing business,'" *Id.* at 382. *See also Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286–87 (1932) (similar).

Petitioner and supporting amici strenuously dispute the Montana court's reading of *Miles*, *Pope*, and *Terte* because "not one of these cases so much as mentioned personal jurisdiction under the Due Process Clause." Pet'r Br. 20. *See also* Brief for Amici Curiae the Chamber of Commerce of the United States of America, et al. ("U.S. Chamber Br.") 16-17; Brief of Amicus Curiae National Association of Manufacturers ("NAM Br.") 10-11.[3]

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[3] The Solicitor General gives a fairer reading of these decisions: "It may well be that the Court in those cases believed that a state court hearing a FELA case could exercise personal jurisdiction

Although this Court's opinions did not use those terms, they may fairly be read as finding no violation of "traditional notions of fair play and substantial justice," which are the objects of the due process protection. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The *Miles* Court, for example, concluded that plaintiff's pursuit of her claim in the Illinois court, even if inconvenient to the railroad, could not be enjoined as "inequitable and unconscionable," *Miles*, 315 U.S. at 705, particularly where the railroad was "not merely soliciting business but actually carrying on railroading by operating trains." *Id.* at 702.

Likewise, in *Pope*, this Court rejected the railroad's claim that the state court suit be enjoined as oppressive because the suit "subject[ed] it to the burden and expense of defending the claim in a distant forum." 345 U.S. at 381. In *Terte*, this Court allowed plaintiff's Missouri lawsuit despite the railroad's argument that jurisdiction based on doing business in the state violated its Fourteenth Amendment due process rights. 284 U.S. 285.[4]

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over a defendant railroad doing business in the State." Brief for the United States ("U.S. Br.") 23.

[4] *See also McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230 (1934), where a Tennessee resident who was injured in Tennessee filed a FELA action in Alabama state court against "a foreign corporation doing business in Alabama." *Id.* This Court, in an opinion by Justice Brandeis, held that Alabama's courts were required to open their doors to plaintiffs suing under the federal statute. *Id.* at 233-34. In *Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377 (1929), plaintiff brought suit in a New York court for injury sustained in Connecticut while working for defendant, a Connecticut corporation, which was doing business in New York. *Id.* at 385. The Court, in an opinion by Justice

Clearly, a great many justices on this Court, both in the majority and in dissent, did not perceive fundamental unfairness in requiring railroads to defend against FELA claims by injured railroad workers in states where those companies conducted railroading operations.

B. Historically, State Courts Have Exercised Jurisdiction Over Foreign Corporations Based on Their Consent To Jurisdiction as a Condition For Doing Business In the State.

1. Jurisdiction based on registering to do business and actually doing business in the forum state has long been an accepted basis for exercising jurisdiction over foreign corporations.

One amicus in this case correctly observes that Congress amended the FELA in 1910 in light of "then current doctrine allowing states to hear cases against corporations doing business within their borders." Stephen Sachs Br. 6. As Justice Scalia has noted, by the late 19th century, courts had expanded their jurisdiction over corporations beyond the state of their incorporation using two theories: "consent" and "presence." *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990) (plurality opinion). These theories are closely intertwined, and, under both, the first question

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Holmes, held that "the *grant of jurisdiction* in [FELA] does not purport to require State Courts to entertain suits arising under it but only to empower them to do so." *Id.* at 387 (emphasis added).

to be determined was whether or not the corporation was 'doing business' within a state." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1066 (4th ed.).

The consent basis for jurisdiction over foreign corporations predated *International Shoe*'s minimum contacts standard and was well-accepted prior to the adoption of the Fourteenth Amendment. Its rationale is that, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703 (1982). Thus in *Lafayette Ins. Co. v. French,* 59 U.S. (18 How.) 404 (1856), this Court upheld the jurisdiction of an Ohio court to hear a suit against an Indiana corporation with its principal business office in Indiana. By voluntarily appointing a registered agent to receive service of process on the corporation's behalf, service was effective "as if the defendant were within the State." *Id.* at 407.

The Court returned to this issue in *St. Clair v. Cox,* 106 U.S. 350 (1882), on review of a judgment rendered by a Michigan court against an Illinois corporation. Justice Field wrote for the Court that the rule that corporations may be sued only in their state of incorporation "was the cause of much inconvenience and often of manifest injustice." *Id.* at 355. To remedy this injustice, many state legislatures imposed as a condition of doing business in the state, that foreign corporations consent to the jurisdiction of its courts. As Justice Field explained:

> [W]hen a foreign corporation sent its officers and agents into other states and opened offices, and carried on its

> business there, it was, in effect, *as much represented by them there as in the state of its creation*. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

Id. (emphasis added). Such jurisdiction does not violate "natural justice," so long as process was properly served on the designated agent. *Id.* at 357. Significantly, as indicated by the emphasized text, the Court viewed a foreign corporation that not only appointed a registered agent, but actually opened offices and carried on business in the forum state, as essentially at home there as in the state of its creation.

This Court has consistently upheld a state court's personal jurisdiction over a foreign corporation where state law required appointment of an agent to receive process, and the corporation did in fact designate such an agent. *See, e.g., Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94-96 (1917). In *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U.S. 213 (1921), the Court indicated no federal impediment to construe such consent to apply to conduct outside the forum state if state law so provided. Again, in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), the Court upheld the exercise of general jurisdiction over a foreign corporation based on the state's business registration procedures, as such consent was part of the bargain by which a corporation enjoys the benefits of doing business in the state. *Id.* at 175. *See also National Bank of N. Am. v. Assocs. of Obstetrics*

& Female Surgery, Inc., 425 U.S. 460, 462 (1976) (Rehnquist, J., concurring) ("*Neirbo* establishes that petitioner National Bank could be deemed to have consented to being sued in Utah by providing an agent for service of process in that State or otherwise qualifying to do business therein.").

Moreover, "prior to *International Shoe*, the general view seemed to be 'that corporate presence, once established, was sufficient to support jurisdiction without regard to whether the claims arose from activity inside or outside the state.'" Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 Hous. L. Rev. 631, 636 & n.13 (2016) (quoting Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 Colum. L. Rev. 960, 980 n.94 (1981)); *see, e.g.*, *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917-18 (N.Y. 1917) (Cardozo, J.) (New York courts could exercise personal jurisdiction over a nonresident corporation which "is engaged in business within this state" and the agent of which was properly served within New York even though "the cause of action sued upon has no relation in its origin to the business here transacted.").

Jurisdiction based on consent is in no way inconsistent with *International Shoe*, which established that "if he be not present within the territory of the forum," 326 U.S. at 316, and "even though no consent to be sued or authorization to an agent to accept service of process has been given," *id.* at 317, the defendant may be subject to the state's jurisdiction based on "the quality and nature of [his] activity" in relation to the forum. *Id.* at 319. In *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946), decided shortly after *International Shoe*, this

Court held that a defendant "consenting to service of process upon its agent residing in the southern district, . . . rendered itself 'present' there." Id at 442.

Nor is such general jurisdiction based on consent inconsistent with this Court's decision in *Daimler AG v. Bauman,* 134 S. Ct. 746 (2014). The *Daimler* Court limited its discussion to general jurisdiction over "a foreign corporation that has not consented to suit in the forum." 134 S.Ct. at 755-56. *See also, Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 928 (2011)). The notion that consent jurisdiction is no longer viable after *Daimler* would convert a waivable due process right to one that is not waivable.

Such a holding would also cast grave doubt on this Court's precedents favoring enforcement of contract provisions agreeing to arbitration, which this Court has described as "a species of forum-selection clause." *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 289 (1995). Such provisions are favored, *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 345-46 (2011), and agreements to submit to a particular forum are broadly enforced, *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 591 (1991), as part of "a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 29 (1991). *See also National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315-16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court"); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 Fla. L. Rev. 361, 378-

92 (1993) (examining forum selection provisions as a waiver of objection to personal jurisdiction).

Corporations that register to do business in a state and actually conduct business there assuredly have "fair warning" they may be sued there and can structure their conduct accordingly. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

2. BNSF has consented to the jurisdiction of Montana courts

Unlike the defendants in *Daimler* and *Goodyear*,[5] BNSF applied for and obtained a license to do business in the state and appointed an agent to receive service of process there.[6] As the court below

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[5] *See Goodyear*, 564 U.S. at 921; *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at *6 (N.D. Cal. Nov. 22, 2005).

[6] BNSF applied for and was granted a Certificate of Authorization, which empowered it to transact business in Montana and vested it with "the same" rights and privileges "as a domestic corporation of similar character," including the ability "to sue and be sued, complain and defend" in the Montana courts. *See* Mont. Code Ann. § 35-1-1030(1)-(2); § 35-1-115. *Tyrrell v. BNSF Ry. Co.*, 2015 WL 5517415, at *12-13 (Mont. July 15, 2015) (Tyrrell/Nelson's Consol. Answer Br.).

The Solicitor General notes that Respondents argued that BNSF had consented to the state courts' jurisdiction, but that the "Montana Supreme Court declined to address that argument." U.S. Br. 4. This Court, of course, does "often affirm a judgment on a ground not relied upon by the court below [if it was raised below]." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 740 (1989) (SCALIA, J., concurring in part and concurring in the judgment). *See also Thigpen v. Roberts*, 468 U.S. 27, 29–30 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted.").

emphasized, BNSF conducted substantial business in the state.

Inexplicably, NAM claims that BNSF has "never availed itself of Montana laws such that it could be subject to lawsuits there." NAM Br. 8. To the contrary, in addition to the actions identified by Respondents by which BNSF has "invoke[ed] the benefits and protections of [Montana's] laws," *see e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011)(plurality), BNSF (and its predecessor Burlington Northern, Inc.) regularly appeared in Montana courts to protect or advance its interests in the state. Among the reported decisions are *BNSF Ry. Co. v. Shipley*, 366 Mont. 542 (2012) (unpublished), in which BNSF appeared as a plaintiff to recover unpaid rent on property it owned; and *Langemo v. Montana Rail Link, Inc.*, 38 P.3d 782 (Mont. 2001) in which BNSF as a defendant in a personal injury action along with MRL, filed a counterclaim.

BNSF has also made use of Montana courts to challenge or reduce state or county taxes levied on it.[7] *E.g., Schwinden v. Burlington N., Inc.*, 691 P.2d 1351 (Mont. 1984) (challenge to the Montana corporation license tax); *Burlington N., Inc. v. Flathead Cty.*, 575

Alternatively, as Respondents suggest, this Court may deem it appropriate to remand this case to the Montana court in light of the state law aspects of the consent analysis. Resp. Br. 50.

[7] BNSF is the second largest property taxpayer in Montana, paying $17 million in 2015. Pat Corcoran, *Northwestern and Property Taxes*, The Missoulian, Nov. 14, 2016, available online at http://missoulian.com/news/opinion/columnists/northwestern-and-property-taxes/article_40acdb6c-a51d-539d-b4bf-3d0ed78137c0.html

P.2d 912 (Mont. 1978) (challenging county property tax levy for teachers' retirement fund); *Burlington N., Inc. v. Richland Cty.*, 512 P.2d 707 (Mont. 1973) (successfully challenging county tax for airport bond). *See also Burlington N., Inc. v. Montana Dep't of Revenue*, 781 P.2d 1121 (Mont. 1989) (upholding subpoena of employee pay records in connection with state income taxation on railroad employee earnings).

II. DUE PROCESS MUST BE MEASURED AGAINST THE FACTS OF INDIVIDUAL CASES.

A. Inflexible Jurisdictional Requirements Do Not Serve Fundamental Fairness or Substantial Justice.

"[T]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

Petitioner, however, argues that this Court's *Daimler* decision imposes a bright-line "straightforward constitutional rule." Pet'r Br. 4. Petitioner's version of this rule would permit a state court to assert general personal jurisdiction over a corporate defendant only in the state where it is incorporated or has its principle place of business or has a "surrogate principal place of business," a reference to *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437 (1952). Pet'r Br. 24.

This Court has emphasized that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria*

& Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citations omitted). Indeed, the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.*

This Court has explained that with respect to personal jurisdiction "few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Kulko v. Super. Ct.*, 436 U.S. 84, 92 (1978). Due process simply resists "clear-cut jurisdictional rules" and "talismanic jurisdictional formulas." *Burger King*, 471 U.S. at 485-86.

Petitioner's inflexible, one-size rule cannot provide the flexibility and fact-based assessment of fairness that due process requires.

> Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (quoting *International Shoe*, 326 U.S. at 319).

In *International Shoe*, this Court declared that Due Process requires only that a defendant have sufficient "contacts with the State such that the maintenance of the suit does not offend traditional

notions of fair play and substantial justice." *Id.* at 316 (internal quotation omitted). The Court did not suggest that general jurisdiction over corporate defendants warranted its own separate, bright-line rule. Rather, the Court made clear that a corporation may be subject to all-purpose jurisdiction when its contacts with the forum consist not only of "continuous activity of some sorts within a state," but contacts "*so* substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.* at 318 (emphasis added).

This Court in *Daimler* explicitly rejected the rule advanced by BNSF here. 134 S. Ct. at 760 ("*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business.") (emphasis in original). Rather, the Court reaffirmed the flexible standard it had set out in *International Shoe*, looking to whether the corporation's "affiliations with the State are *so* 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* at 761, (quoting *Goodyear*, 564 U.S. at 919 (emphasis added)).

B. Limiting General Jurisdiction to a Corporation's State of Incorporation or Single Principal Place of Business Does Not Comport With Due Process.

BNSF insists that due process requires that it be subject to general personal jurisdiction in only two states. Pet'r Br. 23. *See also* NAM Br. 2 ("As a matter of due process, a state can exercise general personal jurisdiction over a business only where the business is

'at home,' namely its place of incorporation or principal place of business.")[8]; Chamber Br 9. (similar).[9]

AAJ submits that little can be gained by leaning heavily on the "at home" metaphor. Judge Jerome Frank astutely warned that "danger lurks in the literal use of a metaphor as if it were a complete statement of actual fact rather than a sort of analogy or 'fiction ....'" *Larson v. Jo Ann Cab Corp.*, 209 F.2d 929, 932 (2d Cir. 1954). Indeed, a few years prior to *Daimler*, Justice Kennedy pointed out that reliance on the "stream of commerce" metaphor had carried the lower court to an erroneous conclusion because "like other metaphors, [it] has its deficiencies as well as its utility." *Nicastro*, 564 U.S. at 877.

1. A Corporation's State of Incorporation Has Little Bearing on the Fairness of Jurisdiction in the Courts of that State.

In this case, BNSF rests on the "at home" metaphor rather than address whether its "continuous corporate operations within [Montana]

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[8] BNSF acknowledged below that under its proposed rule, "a Montana resident, hired and employed by BNSF in Montana, who was injured while working—even temporarily—for BNSF in another state, would not be able to bring his action in the state in which he regularly resides and where his employer regularly conducts business." *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 7 (2016).

[9] The United States espouses the position that a corporation can be "at home" in multiple states, based on "contacts sufficient to make the corporation at home in the State," such that "it would [not] be unfair to make the corporation answer for any and all claims against it in the State's courts." U.S. Br. 28.

were ... so substantial and of such a nature as to justify suit against it on causes of action arising" in other states. *International Shoe*, 326 U.S. at 318-19.

For example, BNSF claims to be "at home" in its state of incorporation, Delaware, despite the fact that it conducts no operations there, owns no track there, and has no employees there. *See* BNSF, Operating Divisions Alignment Map, May 24, 2016.[10] Businesses select their state of incorporation for a variety of reasons, many of which have little to do with their actual business operations. *See* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 Calif. L. Rev. 1775 (2002) (analyzing the empirical evidence that a state's anti-takeover statutes and legal protection of managerial interests influence the decision of where to incorporate or reincorporate); Scott D. Dyreng, Bradley P. Lindsey & Jacob R. Thornock, *Exploring the Role Delaware Plays as a Domestic Tax Haven*, 108 J. Fin. Econ. 751, 761 (2013), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737937.

In 2007, nearly one million corporations were incorporated in Delaware. *See* Lewis S. Black, Jr., *Why Corporations Choose Delaware* 1 (Del. Dep't of State 2007), available at https://corp.delaware.gov/pdfs/whycorporations_english.pdf. In fact, over 285,000 separate corporations have their legal address at one address—a small office building at 1209 North Orange Street in Wilmington, Delaware. Heiser, 53 Hous. L. Rev. at 665 & n.162

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[10] Available at http://www.bnsf.com/customers/pdf/maps/network-map.pdf.

(2016). Most of these corporations "have no office, employees, or actual business operations" in Delaware; "they simply have a dropbox." *Id.* at 665.

For BNSF to insist that it might reasonably expect to be sued in Delaware by an injured rail worker, but not in Montana, where it actually engages in railroading operations is simply not credible.

2. *Fundamental Fairness Does Not Limit Jurisdiction to the Courts of a Single Principal Place of Business.*

Nor is it reasonable for BNSF to assert that it can be "at home" based on its business activities in only one other state, its "principal place of business."

A large company like BNSF may engage in activities in several states apart from its principal place of business that may be sufficient to treat the company as if it were a domestic corporation. *See* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Jurisdiction After Daimler AG v. Bauman*, 76 Ohio St. L.J. 101, 151-55 (2015) (discussing several situations where the level of a corporation's in-state activities justify general jurisdiction in a state other than the principal place of business). It may not only be difficult to identify a major corporation's principal place of business, but the fact that a corporation might have more contacts in another state "seems virtually irrelevant to any of the convenience or fairness policies underlying the imposition of general jurisdiction over a defendant" in the forum. Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 742 (1988).

This Court has itself strongly suggested that a company can be subject to general personal jurisdiction in a state that is not its state of incorporation or primary place of business, but in which it conducts substantial activities. In *Perkins*, the Benguet Consolidated Mining Co. was organized in the Philippine Islands for the purpose of mining and selling gold and silver. The company at no time mined or sold gold or silver in Ohio. Its Philippine operations had been interrupted by World War II and had not resumed at the time suit was filed in 1947. *Perkins v. First Nat. Bank of Cincinnati,* 79 N.E.2d 159, 165 (Ohio Com. Pl. 1948). The company's operations consisted of rehabilitating the mines, activities which were conducted in the Philippines. Equipment was purchased for this purpose outside of Ohio. However, many of the purchase orders were signed by the company's president and general manager, residing temporarily in Ohio, who also "disbursed funds due employees to their relatives in the United States when requested so to do." *Id.* This Court stated that Benguet was "at home" and subject to general jurisdiction in Ohio because "Ohio was the corporation's principal, if temporary, place of business." *Daimler* at 756. But assuredly Benguet's Philippines operations were sufficient to deem that it was essentially at home there as well, even aside from its place of incorporation.

Daimler also indicated that a corporation may be deemed sufficiently "at home" by virtue of its substantial business operations in the forum. This Court assumed, for purposes of its decision, "that MBUSA [Daimler's American importer and distributor] qualifies as at home in California." 134 S.Ct. at 758. Because MBUSA was neither incorporated in California nor had its principal place

of business there, *id.* at 761, the Court must have assumed MBUSA to be "essentially at home" by virtue of its continuous and systematic business operations as "the largest supplier of luxury vehicles to the California market." 134 S. Ct. at 752. If MBUSA's contacts in California were not sufficient to make it "essentially at home," then the thrust of the Court's discussion – whether MBUSA's California contacts could be attributed to *Daimler* – was not at all necessary.

BNSF argues that this case requires the same result as *Daimler* because Montana has violated BNSF's "liberty interest in not being subject to the binding judgments of a forum with which [BNSF] has established no meaningful 'contacts, ties, or relations'" Pet'r Br. 47 (quoting *International Shoe*, 326 U.S. at 319). Similarly, AAR argues that affirmance of the Montana court's ruling "would make railroads susceptible to suit in jurisdictions having *no* connection to the parties or the underlying cause of action." AAR Br. 8 (emphasis added). The Chamber sees the decision below as exposing corporations "to suit on claims having no connection whatever to the forum State." Chamber Br 20.

That is clearly not this case. The Montana court summarized the extensive business operations BNSF conducts in the state. Moreover, even if one accepts the characterization of Texas as BNSF's principal place of business, the nature and quality of its Montana contacts make it essentially at home there as well.

For example, in the 2013 Annual Report BNSF is required (under 49 U.S.C. § 11145) to file with the

U.S. Surface Transportation Board (STB)[11], BNSF reported it owned 23,319 miles of track in the U.S. and Canada. It owned 2,061 miles of track in Montana (8.84% of the total), second only to Texas, where BNSF owned 2,856 miles (11.09%). Comparatively, in most of the remaining 26 states and territories BNSF owns far less track. In addition, track ownership demonstrates the permanent and continuous nature of BNSF's contacts with Montana. BNSF cannot sell or abandon track without first obtaining approval from the U.S. Surface Transportation Board (STB). *See* 49 U.S.C. § 11321 *et seq*; 49 U.S.C. § 10903 *et seq*. Thus, BNSF's contacts in Montana are precisely the kind of contacts that render it as essentially at home in Montana as in Texas.

3. The Nature of Defendant's Contacts With the Forum State and Their "Relatedness" To the Litigation Should Be A Factor In Assessing the Fairness of Jurisdiction.

Goodyear and *Daimler* were cases in which general jurisdiction was asserted over corporations that had not consented to jurisdiction in the forum and had only tenuous connections with the forum through corporate affiliates. In this case, although plaintiffs' causes of action do not arise out of BNSF's railroading operations in Montana, they assuredly "relate[] to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 924. Plaintiffs' causes of action

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[11] Available at Tab P-75 at: https://www.stb.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/0c2ea96fedde563985257b41004c7d41?OpenDocument OR http://www.bnsf.com/about-bnsf/financial-information/surface-transportation-board-reports/#%23subtabs-2 (page 96 of the pdf)

arise out of conduct in other states that mirrors BNSF's conduct in Montana. BNSF employees engaged in those operations are covered by FELA and may themselves bring FELA suits against BNSF in Montana courts. The same allegedly negligent practices and procedures at issue in this case also affect Montana residents working in BNSF's Montana facilities and on BNSF's Montana track.

III. FORUM SHOPPING PROVIDES NO SUPPORT FOR NARROWING STATE COURT JURISDICTION OVER CORPORATE DEFENDANTS.

A. "Forum Shopping" Provides No Support For Limiting the Jurisdiction of State Courts Absent Demonstrable Fundamental Unfairness To Defendants.

Petitioner nevertheless insists that this Court shut plaintiffs out of Montana state courts to combat "rampant forum shopping" in Montana and elsewhere. Petition 24. Amicus NAM similarly calls upon this Court to reverse and "send a clear message against improper forum shopping," calling it "jurisdictional gamesmanship" that threatens "traditional notions of fair play and substantial justice." NAM Br. 16.

Beyond such rhetorical flourishes, however, neither BNSF nor its supporting amici provide a definition of "forum shopping" nor any explanation of how adjudicating plaintiffs' claims against BNSF in Montana, where BNSF conducts substantial railroading operations, deprives the corporation of due process or substantial justice. Their use of "forum

shopping" as an epithet does not assist this Court's analysis. *See* Friedrich K. Juenger, *What's Wrong with Forum Shopping?*, 16 Sydney L. Rev. 5, 13 (1994) ("[T]here must be a stop put to the customary, almost ritualistic, condemnation of forum shopping"); Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QLR 25, 25 (2005) (denouncing "rhetoric [that] simply proclaimed, almost ipse dixit, that forum shopping was wrong, without the slightest explanation as to why.")

"Forum shopping," states the California Supreme Court, is the "'practice of choosing the most favorable jurisdiction . . . in which a claim might be heard.'" *California v. Posey*, 82 P.3d 755, 774 n.12 (Cal. 2004) (quoting Black's Law Dictionary 666 (7th ed. 1999)). The plaintiff is, of course, "the master of the complaint." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), and is entitled to make that choice. *See, e.g., Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263, 266 (1949) ("The right to select the forum granted in [FELA § 56] is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right.").

Plaintiffs' counsel "would not be fulfilling their legal duties towards their clients if they failed to make use of jurisdictional options." Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of A Controversial Practice*, 45 Int'l Law. 1005, 1007 (2011).

Thus, as Justice Rehnquist observed, it is the accepted "litigation strategy of countless plaintiffs [to]

seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984). Justice Robert Jackson, concurring in *Miles*, similarly recognized that plaintiffs, who are given "choices of tribunal," make use of those choices to obtain favorable courts and juries. 315 U.S. at 706–07 (Jackson, J., concurring).

As trial lawyers are well aware, the selection of a favorable forum may turn on any of countless interjurisdictional variations. AAJ would emphasize that representation of rail employees pursuing FELA claims is a specialized area of practice, and practitioners are not evenly distributed throughout the country. An injured worker's counsel of choice may practice in a different state. As well, some state courts may be more experienced in presiding over FELA cases. Trial in one state may also be more convenient because the courthouse is nearer to plaintiff's home, even though it is in an adjoining state. Injury may occur in small or remote localities. The forum state may promise a more expeditious disposition simply because its docket is less crowded.

Another important decisional factor is the cost of a jury trial. The right to have a claim tried by a jury is "part and parcel of the remedy afforded railroad workers" under FELA. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952); *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943). Yet the cost of jury fees can vary substantially from state to state. For example, in Louisiana, the party requesting trial by jury must deposit with the Clerk of Court $2,000 for the first day of trial and $400 for each additional day the trial is expected to last. LA. C.C.P. art. 1734.1. In neighboring Texas, however, the clerk

of a district court is required to collect a jury fee of $30. Tex. Gov't Code § 101.0611(17). For a Louisiana brakeman injured in Louisiana, who desires to try his case to a jury, the option to file in Texas, where the employer conducts substantial business, is, as the *Boyd* Court stated, "a substantial right." 338 U.S. at 266.

These advantageous choices for plaintiffs do not impose unfair disadvantages on defendants. "Forum shopping" that amounts to no more than "forum selection" for legitimate advantage provides no legitimate basis for limiting a party's ability to choose the most favorable forum in which to pursue his or her claim. *Cf., Carnival Cruise Lines*, 499 U.S. at 591-96 (approving defendants' use of forum selection clauses in arbitration agreements).

For that reason, thoughtful scholars take the view that forum shopping is an abuse to be combatted, not where it yields an advantage to the plaintiff, but only where it results in "the taking of an unfair advantage of [the opposing] party in litigation." Maloy, *supra,* at 28; Petsche, *supra,* at 1008 (similar); Juenger, *supra,* at 13 (similar).

BNSF has failed to make such a showing in this case.

B. BNSF Has Not Established Any Unfairness In Permitting Plaintiffs To Bring Their FELA Actions In Montana, Rather Than In the Courts Of Delaware or Texas.

A FELA plaintiff's choice of state forum offers little in substantive law advantage, because federal

law provides the substantive rules of liability. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). More basically, unless a state's law is fundamentally unfair to the litigant, this Court has "no occasion to enquire by what law the rights of the parties are governed" when assessing the propriety of the choice of forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247–48 (1981) (quoting *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 419 (1932)). The differences BNSF sets forth as reasons plaintiffs might choose to file their FELA actions in Montana do not result in any fundamental unfairness to defendants.

1. Montana's application of FELA's statute of limitations is not fundamentally unfair to BNSF.

BNSF complains that Montana courts apply FELA's three-year statute of limitations in a plaintiff-friendly fashion. Pet'r Br. 11. *See also* NAM Br. 17 ("[T]he Montana Supreme Court has adopted a more liberal interpretation of the statute of limitations than several federal circuits."). This Court has previously indicated that the fact that a plaintiff has selected a forum with the most favorable statute of limitations "does not alter the jurisdictional calculus." *Keeton*, 465 U.S. at 779. In addition, the fact that a state court's interpretation of FELA differs from that of some federal courts does not speak to the "forum shopping" claimed by BNSF in this case – plaintiffs' decision to sue in Montana rather than another state's courts. Finally, the Montana Supreme Court's decision on this matter, is firmly grounded in this Court's FELA precedent *Urie*, 337 U.S. at 174, as well as this Court's holding in *McBride*, 564 U.S. at 690. *See also Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1260–61 (Mont. 2015), *cert. denied*, 136 S. Ct. 1493 (2016). If

that interpretation of the federal statute is in error, the appropriate vehicle for correction is review by this Court in the proper case, not a broad jurisdictional rule closing the doors of state courts against FELA plaintiffs.

BNSF also complains, "Once a complaint is timely filed within the applicable statute of limitations, Montana gives plaintiffs up to three additional years to serve the complaint on the defendant." Pet'r Br. 10. It is difficult to discern what advantage this rule bestows on plaintiffs in FELA cases, where the defendant is seldom difficult to locate. This procedure is unlikely to influence a plaintiff's choice of forum.

2. Montana's "suggestion" that FELA damages may not be reduced for plaintiff's preexisting condition is not fundamentally unfair.

Petitioner also states, "Whereas railroad defendants in other courts are entitled to have their FELA liability apportioned to account for a plaintiff's preexisting conditions, the Montana Supreme Court has strongly suggested that railroads cannot make this defense." Pet'r Br. 11, *citing Anderson.*, 354 P.3d at 1263-64.

This interpretation is firmly grounded in the statutory text. As the *Anderson* Court pointed out, Congress provided for apportionment of damages only based on plaintiff's comparative negligence and for no other reason. 354 P.3d at 1263. If this interpretation is in error, the proper vehicle for relief is review by this Court in the appropriate case, not closing the doors of state courts to FELA plaintiffs.

3. Montana discovery practice is not fundamentally unfair to BNSF.

Petitioner states that "Montana does not require discovery to be proportional to the needs of the case." Pet'r Br. 10. In fact, although the Montana rule does not use the term "proportional," it tracks the federal rule closely. The federal rule allows parties to obtain discovery that is

> [P]roportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1).

By comparison, Montana's rule requires the court to limit discovery if

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Mont. R. Civ. P. 26(b)(2)(C).

Any difference in discovery practice does not render Montana's rule fundamentally unfair. Moreover, a difference in discovery rules between Montana and federal courts is not relevant to BNSF's contention that plaintiffs should not be permitted to sue in Montana, rather than other state courts.

4. Montana's evidentiary rules regarding expert testimony are not fundamentally unfair.

Petitioner complains that Montana generally does not follow the standards for expert witnesses set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet'r Br. 11. BNSF does not explain how Montana's rule is necessarily unfair to defendants. And, once again, the distinction in procedural rules between state and federal courts does not speak to whether there may be potentially unfair forum shopping among states where the railroad is present and doing business.

5. Montana's Rule Against Forum Non Conveniens in FELA cases is not fundamentally unfair.

Petitioner claims that it is disadvantaged because the Montana Supreme Court "refuses to allow motions to transfer FELA cases based on forum non conveniens." Pet'r Br. 10.

This Court has already established that a state court "should be free[] to decide the availability of the principle of forum non conveniens in these [FELA] suits according to its own local law." *State of Mo. ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950). *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 444

(1994) (The Jones Act, which incorporates FELA, 46 U.S.C. § 30104, permits state courts to apply their local forum non conveniens rules.).

6. Montana's pro hac vice rules are not fundamentally unfair.

The Chamber, in addition to its unsupported claim that Montana "has become a magnet for FELA suits given its plaintiff-friendly procedural and substantive FELA law," also complains that "Montana has some of the strictest pro hac vice rules in the country." U.S. Chamber Br. 21.

BNSF has extensive railroading operations in Montana and must be prepared to defend FELA suits in Montana arising out of those operations. BNSF certainly faces no greater difficulty retaining counsel who are authorized to appear in Montana courts than nonresident plaintiffs.

7. The fact that Montana permits FELA suits by nonresident plaintiffs is not fundamentally unfair.

Petitioner and supporting amici emphasize the fact that plaintiffs "are residents of other states (North Dakota and South Dakota) who never worked a day in Montana." Pet'r Br. 4. *See also* NAM Br. 18 (Complaining of asbestos claims in Illinois state courts filed by nonresidents). However, this Court made clear that "general jurisdiction to adjudicate has in [United States] practice never been based on the plaintiff 's relationship to the forum." *Goodyear*, 564 U.S. at 929 n.5. *See also Keeton*, 465 U.S. at 779 (plaintiffs are not required to have "minimum contacts'" with the forum State). Indeed, this Court

has invalidated an agreement between a railroad worker and his employer that purported to limit any FELA action to "the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained" as violative of the "substantial right" granted by FELA for plaintiffs to select their forum. *Boyd*, 338 U.S. at 264 & 266 (1949).

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Montana Supreme Court.

Respectfully submitted,

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AND
BRIEFS

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No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ of *Certiorari* to the Supreme Court of Montana

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line-haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies and the courts.[1]

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a negligence statute enacted over a century ago. Under FELA, railroad employees who are injured on the job may seek compensation from their employing railroad. FELA differs fundamentally from the workers' compensation systems that today cover virtually all other U.S. industries. Under a workers' compensation system, the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. In contrast, liability under FELA is conditioned on proving that the employer's negligence caused the injury, and compensation is reduced to the extent the injury was caused by the employee's negligence.

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[1] Both parties have filed a general consent to amicus briefs. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

FELA presents unique challenges for railroads. Each year hundreds of FELA lawsuits, like the case below, are brought against AAR member railroads. In each of these cases, the parties must litigate the fact-specific questions of fault, causation and damages. The railroads spend hundreds of millions of dollars annually in the defense and payment of FELA claims.

In this case, the Montana Supreme Court held that Montana courts may exercise general personal jurisdiction over FELA defendants as long as the defendant is doing business in the state, even though Montana is neither the defendant's place of incorporation nor its principal place of business. This holding is of great concern to AAR's members because it subjects them to suit in numerous jurisdictions where they are neither "at home" nor where the cause of action arose.

It ignores recent decisions of this Court, and sets railroads apart as a class of defendants that are not entitled to the protection of the Due Process Clause of the Fourteenth Amendment. It is of utmost importance to AAR's members that the Court reverse the decision below and protect the constitutional rights of railroad defendants in FELA cases.

SUMMARY OF THE ARGUMENT

In a series of straightforward decisions this Court has established the constitutional limitations on personal jurisdiction over corporate defendants. Those decisions require that when the cause of action does not arise in the forum state, personal jurisdiction may be exercised only where the corporation is "at home." Other than under extraordinary circumstances, corporations are "at home" in their state of incorporation or principal place of business.

The court below held that this Court's decisions do not apply to FELA cases, and, in any event, that when Congress enacted FELA it designated railroads as being "at home" wherever they do business.

The four largest freight railroads and Amtrak each do business in over 20 states, and under the ruling below, would be subject to personal jurisdiction in each of those states. The Montana court's conclusion that such a result has been approved by this Court is incorrect. This Court has never held that state courts have general personal jurisdiction in FELA cases wherever a railroad does business.

Nor was the court below correct when it held that Section 56 of FELA confers personal jurisdiction on state courts wherever a FELA defendant is doing business. In 1910, Congress amended Section 56 to expand federal court *venue* in FELA cases. It also clarified that state courts have concurrent *subject matter jurisdiction* in FELA cases, a provision Congress deemed necessary to address an early state court holding that state courts did not have subject matter jurisdiction in FELA cases. However, Section 56 does not address *personal jurisdiction* in FELA cases. Personal jurisdiction remains subject to the requirements of the Due Process Clause as determined by this Court.

ARGUMENT

THE DECISION BELOW SHOULD BE REVERSED BECAUSE IT DEPRIVED RAILROAD DEFENDANTS OF THEIR CONSTITUTIONAL RIGHTS.

A. The Court Below Ignored the Constitutional Limitations on Personal Jurisdiction.

In this case, two railroad employees who did not reside in Montana nor allege their injuries occurred there brought suit in Montana state court against petitioner BNSF Railway. While BNSF operates in Montana and 27 other states, it is not incorporated in Montana, nor does it have its principal place of business in Montana. BNSF Br. at 8-9. The Montana Supreme Court held that Montana courts have personal jurisdiction over nonresident railroads like BNSF in FELA cases, even if the cause of action does not arise from the railroad's activities in the state. Pet. App. 1a-19a.

That ruling is plainly inconsistent with this Court's holdings on the constitutional limitations on general personal jurisdiction under the Due Process Clause of the Fourteenth Amendment. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011). In those cases, this Court held that "a court may assert general jurisdiction over foreign (sister-state or foreign country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State," *Daimler*, 134 S.Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919), and that absent exceptional circumstances, "[w]ith respect to a

corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" *Id.* at 760.

The court below held that those decisions are inapplicable to FELA. The Montana Court distinguished *Daimler* because it "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. However, *Daimler* addressed the requirements of the Due Process Clause of the Fourteenth Amendment, requirements that are no less applicable when a lawsuit arises under FELA or because the defendant is a railroad. Noting that this Court "did not address personal jurisdiction under the FELA" in *Daimler,* Pet. App. 11a, the Montana court did not explain why a different constitutional analysis for personal jurisdiction would apply to suits brought under FELA. Instead, in direct contradiction to *Daimler*, the court established its own test, holding that "BNSF does business in Montana; therefore, under the FELA, Montana courts have general personal jurisdiction over BNSF." Pet. App. 15a.

That ruling is at odds with the constitutional requirements for personal jurisdictions as determined by this Court. "A corporation's continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Goodyear,* 564 U. S. at 927 (internal quotations omitted). In *Daimler*, this Court reaffirmed that to assert general jurisdiction over a corporation on the grounds that it "engages in a substantial, continuous, and systematic course of business" would be "unacceptably grasping." 134 S.Ct. at 761. The fact that a cause of action arises under FELA does not create an exception to the protections provided to all litigants by the Constitution.

The principles set forth in *Daimler* and *Goodyear* were recently applied in FELA cases by the highest courts of two states. In *State ex rel. Norfolk S. Ry. Co. v. Dolan*, No. SC95514 (Mo. Feb. 28, 2017), the plaintiff, an Indiana resident, alleged he was injured in Indiana. He brought suit in Missouri, a state where Norfolk is neither incorporated nor has its principal place of business. Even though Norfolk did substantial business in Missouri—operating about 400 miles of track and generating over $200 million in annual revenue—the court held that those contacts were "insufficient to establish general jurisdiction over Norfolk in Missouri." Slip op. at 8. Inasmuch as the cause of action did not arise out of Norfolk's Missouri contacts, and Norfolk was not "at home" in Missouri, the requirements of the Due Process Clause were not met and the court granted a writ dismissing the case for lack of personal jurisdiction. *See also Barrett v. Union Pac. R.R.*, SC S063914 (Or. Mar. 2, 2017) ("due process does not permit Oregon courts to exercise general jurisdiction over the" Union Pacific Railroad—a Delaware corporation with its principal place of business in Nebraska—in a FELA suit arising in Idaho).

B. The Removal of Due Process Protections from Railroads in FELA Cases Will Have Nationwide Impact.

In 1908, Congress enacted FELA as a national workplace compensation scheme that governs the U.S. railroad industry. 45 U.S.C. §§51-60. FELA is based on tort concepts. In order for railroad employees to receive compensation for workplace injuries they must prove their employer's negligence caused the injury in whole or in part. 45 U.S.C. §51. If the employer can prove the employee's negligence contributed to the

injury, compensation is reduced in proportion to the employee's negligence. 45 U.S.C. §53. If a railroad and an injured employee cannot reach an agreement over compensation, the employee's recourse is to file a FELA lawsuit against the railroad, in which the employee must prove all the elements of a negligence action. *Fulk v. Ill. Cent. R.R.*, 22 F.3d 120, 124 (7th Cir. 1994).

While the number of injuries suffered by railroad employees has greatly decreased over the past few decades, railroads continue to face hundreds of FELA suits each year.[2] Substantive federal law governs those lawsuits. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Subject matter jurisdiction over a FELA suit exists in either state or federal court. 45 U.S.C. §56. However, as with all other causes of action, in order to hear a FELA suit, in addition to subject matter jurisdiction, a court must have personal jurisdiction over the parties. As this Court has instructed, a court's exercise of personal jurisdiction is subject to the limitations imposed by the U.S. Constitution. *Int'l Shoe Co. v. State of Washington,* 326 U.S. 310 (1945).

The situs of FELA lawsuits has long been a contentious issue. As a general matter, plaintiffs often will seek out forums believed to confer a litigation advantage on plaintiffs, even at apparent inconvenience to themselves. *See e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 240 (1981) (plaintiff candidly admitted that the law of the chosen forum was more

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[2] Injuries to railroad employees have decreased by 84% since 1980, and by 47% since 2000. http://safetydata.fra.dot.gov /officeofsafety/publicsite/summary.aspx (2011-2015); Federal Railroad Administration, *Railroad Safety Statistics Annual Report,* 1997-2010, Tables 1-2, 4-1; Federal Railroad Administration, *Accident/Incident Bulletin,* 1980-1996, Tables 13, 36.

favorable to her position than the law of the jurisdiction where the accident occurred and most of the witnesses were located); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (noting that a plaintiff sometimes will attempt to force a trial to a jurisdiction in order to disadvantage an adversary, "even at some inconvenience to himself"). Historically, attempts to find favorable jurisdictions have been a prominent feature of FELA litigation, with plaintiffs often bringing suit in jurisdictions with little apparent connection to the underlying litigation. *See e.g., Matthews v. N. J. Transit Corp.*, 1995 WL 217493 (S.D. N.Y. 1995) (FELA suit filed in New York where plaintiff was a New Jersey resident, was injured in New Jersey, and all expected witnesses resided and worked in New Jersey); *Hayes v. Chicago, Rock Island & Pac. R.R.*, 79 F.Supp. 821 (D. Minn. 1948) (litigation involving eight plaintiffs who brought suit in Minnesota, one of whom sustained injury in Texas, one in Illinois, and six in Oklahoma); *Palumbo v. N. J. Transit Rail Ops., Inc.*, 2003 WL 256939 (Pa. Commw. Ct. 2003) (plaintiff, who brought suit in Pennsylvania, was injured in New Jersey, resided in New Jersey, and all witnesses were located in New Jersey); *Norfolk & W. Ry. Co. v. Tsapis*, 400 S.E.2d 239 (W.Va. 1990) (litigation involving 818 plaintiffs who brought suit in a single West Virginia County, of whom 644 were not West Virginia residents); *Norman v. Norfolk & W. Ry. Co.*, 323 A.2d 850 (Pa. Super. 1974) (plaintiff, a Kentucky resident who was injured in Kentucky, brought suit in Pennsylvania).

The Montana ruling would make railroads susceptible to suit in jurisdictions having no connection to the parties or the underlying cause of action. FELA is a federal statute that applies nationwide. Large railroads conduct operations across numerous states:

BNSF in 28; Union Pacific in 23; CSX in 23 (and the District of Columbia); and Norfolk Southern in 21. In addition to owning tracks, in many of those states large railroads operate rail yards (where traffic is interchanged and trains are broken down and reassembled) and many other facilities; they also originate and terminate a substantial amounts of traffic in many of the states in which they operate. Amtrak, which provides intercity passenger rail service nationwide, operates in 46 states. While Amtrak operates over tracks owned by the freight railroads over most of its routes, it serves hundreds of stations located throughout its network. As a national operator, Amtrak solicits business all over the country.

This Court has held that business activities of that nature are not sufficient to give a state's courts general personal jurisdiction over a corporation. Nonetheless, the only limitation the court below put on its power to hale a nonresident railroad into Montana courts is that the railroad does business in the state.

That test hardly comports with the requirements of due process which focus on providing defendants with predictability and "minimum assurances" about where they can be sued. *Daimler,* 134 S.Ct. at 762. This Court has explained that "[a] corporation that operates in many places can scarcely be deemed at home in all of them," *id.* at 762 n. 20, yet under the Montana court's formulation, BNSF and other large railroads likely would be found at home in most, if not every, state in which they operate. If that were the law, there would be no way for a railroad to predict where on its system it might be sued in FELA cases.

This is not merely speculation; it is a reality of FELA litigation. BNSF has advised this Court that it has recently faced 36 FELA lawsuits in Montana state

court that have no connection to Montana. BNSF Br. at 13. And that is just the tip of the iceberg. Disregard of the constitutional requirements of personal jurisdiction set forth in *Daimler* and *Goodyear* is occurring in state courts nationwide in FELA cases. This has been the historical pattern, *see supra* at p. 8, and continues to be common practice.

AAR's large freight members advise that at least 170 FELA cases are pending against them in the courts of states that are neither (1) the railroad's state of incorporation; (2) the railroad's principal place of business; nor (3) the state where the alleged injury giving rise to the suit occurred. These suits are spread throughout the country, although a few states, including Montana, Missouri, Illinois and Pennsylvania, appear to be magnet jurisdictions for FELA litigation against nonresident railroads. Unless, as the Montana Supreme Court contends, the *Daimler* and *Goodyear* holdings do not apply to FELA cases, then there are many FELA suits pending in state courts throughout the nation where the court has not properly exercised personal jurisdiction over the railroad defendant.

C. Congress Did Not Grant Personal Jurisdiction Over Railroads in FELA Cases to Courts in Every State in Which the Railroad is Doing Business.

The court below held that Congress conferred personal jurisdiction in FELA cases in state courts wherever the railroad is doing business, and that this Court has so held. Citing to *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379 (1953), *Miles v. Ill. Cent. R.R.*, 315 U.S. 698 (1942), and *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941), the Montana court concluded that "the U.S. Supreme Court consistently has interpreted

45 U.S.C. §56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a. The court further asserted that *Daimler* did not overrule those prior decisions. Pet. App. 12a.

It is not surprising that *Daimler* did not discuss those prior decisions of this Court: none of them addressed personal jurisdiction, let alone the constitutional requirements that must be met in order for a state court to exercise general personal jurisdiction. *See* BNSF Br. at 41-44. And there would have been no need for this Court to overrule those decisions because they do not stand for the proposition that the normal test for general personal jurisdiction does not apply in FELA cases. As Justice McKinnon pointed out in her dissent below, the majority arrived at its conclusion "*without citing a single* general jurisdiction case," but instead cited prior decisions of this Court "having nothing to do with general jurisdiction under the Due Process Clause." Pet. App. 27a (emphasis in the original).

Faced with this Court's holdings that a state court may exercise general personal jurisdiction only over a corporation that is "at home" in the state, the court below concluded that "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business.'" Pet. App. 12a. However, Congress may not countermand the requirements of the Constitution. Congress has no authority to affect the personal jurisdiction of state courts, and certainly has no power to grant state courts general personal jurisdiction over FELA defendants in circumstances that do not comport with the requirements of the Due Process Clause.

In any case, by concluding that Congress intended to confer general personal jurisdiction on state courts when it enacted 45 U.S.C. §56, the court below misreads both the statute and congressional intent. Section 56 was enacted to address two specific problems, neither of which concerned the personal jurisdiction of state courts.

In its original form, FELA did not directly address jurisdiction or venue; the statute simply provided that an action must be brought within two years of the day it accrued.[3] For cases filed in federal court, the absence of a specific venue provision meant that the venue for FELA actions was governed by the general federal venue statute, which at the time limited venue to the district where the defendant was an inhabitant. Act of March 3, 1887, 24 Stat. 552, as amended by Act of August 13, 1888, c.866, 25 Stat. 433; *Cound v. Atchison, T. & S.F. Ry. Co.*, 173 F. 527, 533 (W.D. Tex. 1909) (under the federal venue statute, a FELA suit must be brought in the district where the railroad is an inhabitant, *i.e.*, the state of incorporation); *Smith v. Detroit & T. Shore Line R.R.*, 175 F. 506 (N.D. Ohio 1909) (same). Some members of Congress felt that this limitation on venue for federal cases was too restrictive.

Shortly after FELA was enacted another related concern arose. Even though nothing in FELA abrogated the default rule of concurrent subject matter jurisdiction in state courts over federal causes of action, *see Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876),

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[3] FELA was first enacted in 1906, but was struck down as being beyond Congress' constitutional authority. *Howard v. Ill. Cent. R.R.*, 207 U.S. 463 (1908). FELA was reenacted in 1908, and was upheld by this Court as constitutional in all regards. *Mondou v. N.Y., N. Haven & Hartford R.R.*, 223 U.S. 1 (1912).

the Supreme Court of Connecticut held that "Congress did not intend . . . to authorize the institution of an action under [FELA] in the courts of the States." *Hoxie v. N.Y., N. Haven & Hartford R.R.*, 73 A. 754, 762 (Conn. 1909).

Dissatisfaction with the scope of venue for FELA cases in federal court, and a desire to correct the error in *Hoxie*, led Congress to amend FELA in 1910 to add the current language of 45 U.S.C. §56, which reads:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Act of April 5, 1910, c. 143, §1, 36 Stat.291.[4] The 1910 amendment also prohibited removal to federal court of FELA suits originally brought in state court. 28 U.S.C. §1445(a).

The first sentence of this amendment explicitly addressed *venue in federal* courts, and was intended to expand federal venue beyond the narrow prescriptions of the general venue statute in order to enhance the convenience of both parties. ("This amendment is necessary in order to avoid great inconvenience to the suitors . . ." H.R. Rep. No. 513, at 6 (1910).) "Section 6 establishes venue for an action in the federal courts."

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[4] A 1939 amendment increased FELA's statute of limitations from two to three years. Act of Aug. 11, 1939, c. 685, §2, 53 Stat. 1404.

Kepner, 314 U.S. at 52. In *Pope,* this Court described Section 56 as the "venue provisions of the Federal Employers' Liability Act," 345 U.S. at 383, and characterized a bill to amend Section 56 as addressing the question "of whether venue should be more narrowly restricted." *Id.* at 386.

The second sentence of the 1910 amendment addressed the states' *subject matter* jurisdiction in FELA cases. The amendment overruled *Hoxie* and simply clarified that states were competent to hear FELA actions. H. Rep. No. 513, at 7 (1910) ("[M]uch injustice and wrong to suitors may be prevented by an express declaration that there is no intent on the part of Congress to confine remedial actions brought under [FELA] to the courts of the United States."); *see also* 45 Cong. Rec. 2253 (1910) ("I am very sure that [state courts] have concurrent jurisdiction as the law is now, but on account of a decision of one of the state courts of Connecticut . . . the committee thought best to expressly provide in the law that the federal courts and the state courts should have concurrent jurisdiction to avoid the possibility of such a construction in the future.") (remarks of Representative Sterling). When the bill was taken up by the Senate, Senator Borah, noting the *Hoxie* decision, explained that the provision expressly granting concurrent jurisdiction to state courts simply reflected what "the law is" and that "unless there is a clause prohibiting or inhibiting the state court it always has concurrent jurisdiction with the federal courts in such a *subject-matter* as this." 45 Cong. Rec. 3995 (1910) (emphasis supplied).

Contrary to the Montana court's decision below, Section 56 was not intended to confer personal jurisdiction on state courts. Rather, the purpose of Section 56 was to expand federal venue so FELA actions could

be brought in additional federal courts beyond what was permitted by the existing general venue statute, and to confirm that state courts shared subject matter jurisdiction with federal courts. In *Mondou*, this Court observed that "[t]he amendment . . . instead of granting jurisdiction to the state courts, presupposes that they already possessed it." 223 U.S. at 56. This Court further explained that the 1910 amendment to Section 56 did not "involve[ ] any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." *Id.* In *Miles*, this Court explained that "[s]ince the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts springs from federal law, the right to sue in state courts of proper venue *where their jurisdiction is adequate* is of the same quality as the right to sue in federal courts." 315 U.S. at 704 (emphasis supplied). There simply is no basis for concluding that Congress intended to confer personal jurisdiction on state courts when it amended FELA in 1910—even if it had the power to do so consistent with the Constitution.

The court below believed that it is unclear whether the reference to "concurrent" jurisdiction in Section 56 meant to confer subject matter or personal jurisdiction on state courts. Pet. App. 14a. The court resolved that question by finding that FELA's "liberal construction" justifies reading Section 56 to confer on state courts personal jurisdiction over any FELA defendant doing business in the forum state, a far more expansive concept of personal jurisdiction than the Due Process Clause allows. Pet. App. 14a; *see also* Pet. App. 18a ("We also have followed federal case law in giving the FELA a liberal construction to accomplish its humanitarian and remedial purposes (citations omitted). This is especially true regarding a plaintiff's forum

selection under the FELA.") But a liberal construction of a statute is not a justification for abrogating a defendant's constitutional rights.

FELA's oft-remarked upon "liberal construction" refers to its express modification of early twentieth century common law, which Congress believed was necessary in order to facilitate recovery at a time when common law rules often made recovery difficult for injured workers. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994). This included eliminating the assumption of risk and fellow servant doctrines, 45 U.S.C. §54; *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916), and replacing the rule that barred recovery entirely if the worker's negligence contributed to the injury with a comparative negligence scheme. 45 U.S.C. §53. It also included incorporating a more relaxed standard of causation than traditional proximate cause, *CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011). Finally, FELA outlawed contracts and devices the purpose of which is to limit the railroad's liability. 45 U.S.C. §55. Regardless of whether FELA should be construed "liberally," it is not possible to construe Section 56 as a grant of personal jurisdiction to state courts that the Due Process Clause forbids. *See State ex rel. Norfolk S.* (holding that Section 56 of FELA addresses federal court venue and subject matter jurisdiction of state courts, and prior U.S. Supreme Court have not held otherwise).

* * * *

There are constitutional limits on a state's ability to hale nonresident corporations into the state's courts to hear a cause of action that did not arise in the forum state, even if the corporation has continuous and systematic contacts with the state. Contrary to those rulings, the court below held that Montana may exert

general personal jurisdiction over any nonresident railroad that does business in the state if the railroad is a defendant in a FELA action. As a result, by virtue of operating in many states—an inherent aspect of the business of large railroads—railroads would be subject to suit in states that have no connection to the underlying litigation, and where they are not "at home." This sets railroads apart as a unique class of corporate defendants that are outside the protection of the Due Process Clause. This Court should correct that error.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell, and ROBERT T. NELSON,

Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Brotherhood of Maintenance of Way Employes Division/IBT ("BMWED") is an unincorporated labor association that is the collective bargaining representative of nearly 40,000 railroad employees working in the class or craft of maintenance of way employee under Section 1, Sixth of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, Sixth, including employees of Petitioner BNSF Railway Company ("BNSF"). Among other things, BNSF's maintenance of way employees represented by BMWED are responsible for constructing, repairing, rehabilitating, upgrading, renewing, inspecting and maintaining the railroad's track and right of way, as well as bridges, buildings, and other structures. JA 28; *History*, BMWED-IBT, https;//www.bmwe.org/secondary.aspx?id=22 (last visited Mar. 29, 2017). BMWED was the collective bargaining representative of Brent T. Tyrrell, decedent of respondent Kelli Tyrrell. Brent Tyrrell was employed by BNSF as a maintenance of way worker in various states where BNSF owns and operates rail lines. Pet. App. 10a.[1]

BNSF maintenance of way workers generally do not work at a particular location or local geographic area; many of them are assigned to "traveling gangs."

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[1] Pursuant to Supreme Court Rule 37.3, BMWED states that both Petitioner and Respondent parties have filed general consents for the filing of amicus briefs in this case. Pursuant to Rule 37.6, BMWED states that no counsel for any party authored this brief in whole or in part; and no entity or person, aside from BMWED, made any monetary contribution toward the brief's preparation or submission.

JA 30. Many BNSF traveling gangs work across the BNSF system which covers 28 states. BNSF "production gangs" (traveling gangs that are large and mechanized and resemble mobile assembly lines to rehabilitate or build rail lines) work across multiple states (including Montana); certain gangs cover the entire BNSF system. JA 30-31. During the work season, many traveling employees are often hundreds of miles from their homes at the end of a work week, sometimes they may be over a thousand miles from home. *Bhd. of Maint. of Way Emps. v. Atchison, Topeka & Santa Fe Ry. Co.*, No. 96–1515, 1996 WL 904755, at *1 (C.D. Ill. Dec. 17, 1996), *rev'd on other grounds*, 138 F.3d 635 (7th Cir. 1997). Accordingly the workplace for BNSF maintenance of way workers is the entire BNSF system.

As collective bargaining representative of BNSF maintenance of way workers, BMWED is responsible for ensuring that BNSF complies with its collective bargaining agreements with BMWED, but also that BNSF maintenance of way workers have a safe and healthy work environment and that BNSF complies with various federal laws that protect railroad workers, including the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, BMWED and its members have an interest in ensuring that the FELA remains effective in promoting safe and healthy working conditions for maintenance of way workers and that they have effective access to the courts to enforce their rights under the FELA, including their ability to seek its enforcement where they have a right to bring suit under FELA Section 56. JA 31-32.

SUMMARY OF ARGUMENT

BMWED respectfully submits that the Montana Supreme Court correctly concluded that courts in that state have personal jurisdiction over BNSF for

adjudication of employee claims under the FELA. Because Section 56 of the FELA authorizes courts of a state to adjudicate claims of railroad workers under the federal statute, and to exercise personal jurisdiction over a railroad that does business in the state when an injured worker brings a FELA claim against the railroad, the Montana Supreme Court's decision did not cross the boundaries set by the Fourteenth Amendment for the exercise of state court personal jurisdiction. Additionally, by its substantial, systematic and continuing presence and activities in Montana, BNSF has made itself "at home" in the state. The railroad does not merely engage in commerce in the state just by passing through, generating sales through others, contracting with other parties in Montana, or acting through a subsidiary. BNSF itself has a significant corporate presence in the state. It owns large swaths of land, operates in about two-thirds of the state and is one of the largest private employers in Montana. BNSF is therefore subject to the "general jurisdiction" of the Montana courts under *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

ARGUMENT

I. THE FEDERAL EMPLOYER'S LIABILITY ACT CONFERS ON STATE COURTS PERSONAL JURISDICTION OVER ACTIONS AGAINST RAILROADS FOR ENFORCEMENT OF THE FEDERAL LAW

As the Montana Supreme Court observed, the FELA was specifically amended to provide that a claim may be brought in a district court in a district where a railroad is doing business, and that jurisdiction of state courts over FELA causes of

action is concurrent with the jurisdiction of the district courts. *See* Pet. App. 6a (citing 45 U.S.C. § 56). Furthermore, the Montana Court correctly noted that this Court has repeatedly recognized that state courts have jurisdiction over FELA cases under Section 56 when the only basis for jurisdiction is that the railroad is doing business in the state. *Id.* at 8.

In asserting that the Montana courts erred by exercising general personal jurisdiction over the railroad, BNSF misunderstands the basis for the Montana Supreme Court's decision. The Montana Supreme Court did not hold that courts in the state have general personal jurisdiction over BNSF for causes of action under state law. Rather, it held that BNSF is subject to personal jurisdiction in courts in the state for causes action under the federal statute which provides that state courts have jurisdiction over such claims, if a state chooses to assume such jurisdiction. That holding is fully consistent with the decisions of this Court in *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), *Miles v. Illinois Central Rail Co.*, 315 U.S. 698 (1942), and *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), in which the Court rejected challenges to the rights of railroad workers to bring FELA actions against their employers in state courts based on the railroads doing business in those states. BNSF notes that those decisions were issued decades ago. But the substance of Section 56 remains as it was when those cases were decided; and the FELA has not been otherwise amended to lessen its jurisdictional scope. BNSF also argues that these decisions did not mention personal jurisdiction under the Due Process Clause. *See* Pet. Brief at 40. But they each dealt with challenges to the ability of state courts to hear FELA claims against railroads that

were merely doing business in the forum states; each recognized that the FELA authorization for jurisdiction over railroads doing business in a state applies to state courts as well as federal courts, and nothing in those decisions suggests that only subject matter jurisdiction was at issue. And *Miles* and *Pope* both cited Section 56 as the basis for jurisdiction in the state courts. 315 U.S. at 703-04, 345 U.S. at 386.

BNSF also asserts that Section 56 is merely a venue provision that does not provide a basis for personal jurisdiction. Pet. Brief at 28-29. In doing so, BNSF has mischaracterized the above cited decisions of this Court and Section 56. The decisions in *Terte*, *Miles*, and *Pope* all upheld state court exercise of jurisdiction over FELA claims against railroads on the basis that the railroads were doing business in the respective states. *Miles* is particularly apt here. A Tennessee resident brought suit in Missouri state court against an Illinois railroad over an accident that occurred in Tennessee; the Court considered the "substantial business" done by the railroad in Missouri (including daily passenger trains, freight trains, offices in Missouri, and receipts from business in Missouri) and concluded that, under *Terte*, the railroad could properly be sued in Missouri. 315 U.S. at 701. The *Miles* Court also noted the distinction between jurisdiction under FELA and venue, with jurisdiction derived from Section 56, and venue derived from the practice of the forum state. *Id.* at 703.

By its terms, Section 56 is grant of jurisdiction for adjudication of FELA cases, and it explicitly provides that the jurisdiction of state courts over FELA claims is concurrent with that of the federal courts, where jurisdiction is proper wherever a railroad is doing business at the time the claim is brought. BNSF

asserts that "'concurrent' jurisdiction as used in Section 56 has always been understood to refer to subject-matter jurisdiction, not personal jurisdiction." *See* Pet. Brief at 37 (emphasis in original) (referring to the Court's statement in *Growe v. Emison*, 507 U.S. 25, 32 (1993) that "federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter"). But, *Growe* does not support the assertion that concurrent jurisdiction always means subject matter jurisdiction. *Growe* concerned two cases challenging redistricting by Minnesota: one was brought in state court under the federal and state Constitutions, the other case also included a federal statutory claim under the Voting Rights Act, 42 U.S.C. § 1973. The quoted passage referred to state and federal courts having jurisdiction over the same "subject matter" in the sense of hearing claims dealing with the same dispute or problem; the court was not referring to "subject matter jurisdiction." *See also Emison v. Growe*, 782 F. Supp. 427, 430 (D. MN 1992) (finding that court had subject matter jurisdiction under 28 U.S.C. §§ 1343 and 1331 and 42 U.S.C. § 1973, which do not provide subject matter jurisdiction to state courts), *vacated on other grounds*, 507 U.S. 25 (1993). So this Court's statement that the two cases concerned the same subject matter could not mean that the basis for subject matter jurisdiction was the same in each case, rather, they arose out of the same "subject," the Minnesota redistricting. In any event, *Growe* does not support the expansive assertion that concurrent jurisdiction always means subject matter jurisdiction. And references in *Pope*, 345 U.S. at 385, and *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 53-54 (1941) to Section 56 providing for venue does not mean that Section 56 is not also a

grant of jurisdiction. Thus, Section 56 provides state courts with jurisdiction to hear and decide claims under the Federal statute, including personal jurisdiction over railroads doing business in the states; if BNSF objects to that arrangement, its recourse is to Congress, not to seek to invalidation of the statute in the courts.

Because BNSF has misunderstood the basis for the Montana Supreme Court's decision, BNSF's reliance on decisions such as *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984) and *Goodyear*, is misplaced. Those decisions concerned state tort law claims asserted in state courts against corporations that had little or no contact with the states. *See Goodyear*, 564 U.S. 915 (involving foreign subsidiaries of an American company where the subsidiaries had no activity in North Carolina and only put products of the type at issue in that case in the general "stream of commerce"), *Helicopteros*, 466 U.S. 408 (involving a foreign company that did not have a place of business and was not licensed in Texas, did not conduct its business there, its officers merely came to Texas to negotiate a contract and purchase products, and it accepted checks drawn on Texas banks). Those decisions did not involve claims in state courts under a federal law that provided state courts with the same jurisdiction provided to federal courts. And BNSF has cited no decision in which the Fourteenth Amendment was held to preclude state court exercise of personal jurisdiction over a defendant when a claim based on federal law was brought in a state court, where the federal law authorized state courts to exercise personal jurisdiction under that law.

BMWED also submits that Petitioners were correct in arguing that acceptance of BNSF's view of

the law would mean that employees, including Montana resident employees, could not sue BNSF under the FELA in the United States District Court for the District of Montana, even though BNSF is doing business in Montana within the meaning of FELA Section 56, because the Federal court would have to rely on the Montana long-arm statute to assert personal jurisdiction over BNSF. Opp'n to Cert. at 18-19. Furthermore, under BNSF's interpretation of the Fourteenth Amendment and the FELA, the only state courts that would have general jurisdiction over a FELA claim against a railroad would be state courts where the railroad was incorporated and where the railroad maintained its principal place of business. And to the extent that District Courts would rely on state long arm statutes for personal jurisdiction, the logical result of BNSF's argument is that the only District Courts that would have personal jurisdiction over a railroad would be the ones located in the states where the railroad was incorporated and where the railroad maintained its principal place of business. That outcome would be plainly contrary to the intent of Congress in adding Section 56 to the statute, effectively negating the 1910 amendment.

As the Montana Supreme Court recognized, the FELA was passed and amended to address "the special needs of railroad workers" arising from the particular hazards of railroad work, Pet. App. 5a, (citing *Sinkler v. Missouri Pacific Railroad Co.* 356 U.S. 326, 329 (1958)), and this Court has therefore construed the statute broadly in favor of injured railroad workers in order to accomplish the humanitarian and remedial purposes of the FELA. Pet. App. 6a (citing *Labella v. Burlington N., Inc.*, 595 P.2d 1184, 1186 (1979)). BNSF's argument is

particularly inconsistent with the expressed intent of Congress in amending the FELA by adding Section 56 to ensure that employees can bring FELA actions in states where the railroads do business even if they are not headquartered or incorporated in those states. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Reversal of the Montana Supreme Court's decision would mean that BNSF employees who live and work in 28 states in the Midwest and West could only sue BNSF in Delaware and Texas; and it would therefore deprive employees represented by BMWED of their rights under the FELA to bring suit against a railroad where the railroad does business.

BMWED members perform very strenuous and physically challenging work in very hazardous work environments across whole regions of the United States, many are assigned to gangs that cover two-thirds of the country. The FELA grants them the right to bring their claims against railroads under the federal statute in state courts where the railroads are doing business, not just where the railroad is incorporated or maintains its principal office. The Montana Supreme Court's decision is consistent with the language and mandate of the FELA; the position advocated by BNSF would undermine the FELA and deprive BMWED members of their statutory rights and it is not supported by the Fourteenth Amendment.

II. BNSF IS "AT HOME" IN MONTANA AND THEREFORE PROPERLY SUBJECT TO THE GENERAL PERSONAL JURISDICTION OF THE MONTANA COURTS UNDER *DAIMLER* AND *GOODYEAR*

BNSF argues that the Montana Supreme Court flouted this Court's decision in *Daimler* and *Goodyear* by asserting personal jurisdiction over

BNSF based on its presence and activities in the state. Pet. for Cert. at 14. But BNSF's presence and activities in Montana which are so substantial that they clearly provide a basis for the Montana courts to exercise general personal jurisdiction over the railroad without violating the Fourteenth Amendment; and assertion of such jurisdiction is consistent with *Daimler* and *Goodyear*.

BNSF has read *Daimler* and *Goodyear* too narrowly by arguing that they only permit a state to exercise general personal jurisdiction over corporate defendants that are incorporated or maintain their principal place in the state. *See* Brief of Pet. at 17-18. The Court specifically recognized that there may be cases where a corporation's presence and activities in a state are so significant that the corporation is essentially at home there: where contacts and affiliations with the state are "so 'continuous and systematic,' as to render [it] essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919). While the *Goodyear* Court observed that the "paradigm" forum for the exercise of general personal jurisdiction would be the corporation's place of incorporation and principal place of business, 564 U.S. at 924, those were merely paradigms. Those examples were not inclusive of all situations. And the *Daimler* court stated that "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all purpose forums". 134 S. Ct at 760 (emphasis in original). BNSF has ignored the limitations on the holding in *Goodyear*, and the express caution in *Daimler* against construing *Goodyear* too narrowly, by arguing that place of incorporation and principal

place of business are not mere paradigms, but all inclusive boundaries on state court jurisdiction over corporate defendants.

The facts regarding BNSF's presence in Montana demonstrate that its contacts and affiliations with the state are so substantial, continuous and systematic that BNSF is properly considered "at home" in Montana under *Daimler* and *Goodyear*. As the Montana Supreme Court noted, Pet. App. 17a, BNSF conducts business in Montana by operating trains over more than 2000 miles of track.[2] BNSF maintains traffic offices across the state, owns real estate (in addition to the right of way), and does direct advertising in Montana with Montana media. *Id.* BNSF main lines run across the length of the state in the north, from the eastern border to the southern and central parts of the state, and they connect the northern lines to the south-central part of the state; and BNSF branch and feeder lines reach into the interior of the state; BNSF lines cover about two-thirds of the state and touch virtually every city and major town in the northern, eastern and central parts of Montana. *Montana Rail System*, MONT. DEP'T OF TRANSP., ROAD INVENTORY & MAPPING SECTION (Oct. 8, 2013), https://mdt.mt.gov/travinfo/docs/railmap.pdf.

The Montana Supreme Court also found that BNSF has over 2000 employees in Montana (not including maintenance of way traveling gangs that will work in the state as part of their seasonal

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[2] BNSF's Annual Report to the Montana Public Service Commission for 2013 states that BNSF operates 2748 miles of rail lines in Montana. JA 38. Railroad track sits in a roadbed and right of way which usually extends at least ten feet on either side of the track.

production and maintenance schedules).[3] Pet. App. 17a. By comparison, Montana Rail Link, a railroad operating almost exclusively in Montana, operates a third of the track miles that BNSF does in Montana and it has less than half the number of employees in the state as does BNSF.[4] When assessing the significance of BNSF's affiliation and contacts with the state as an employer, the employment numbers should be considered in the context of total employment in the state. According to the Montana Department of Labor And Industry, in 2013 BNSF was one of 19 private employers in Montana that employed over a thousand people; since BNSF employed over 2000 people in Montana it is reasonable to assume that BNSF is in or near the top 10 private employers in the state. *MT Top 100 Employers*, MONT. DEP'T OF LABOR & INDUS., https://data.datamontana.us/buisness/MT-Top-100Employers/fvb9-zhbc (last visited Mar. 30, 2017).[5]

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[3] A PROGRESSIVE RAILROADING article in October of 2013 (Exhibit 7 to Tyrrell's Opposition to BNSF's Motion to Dismiss in the 13th District Court, Yellowstone County) reported that BNSF employed more than 2200 people in 2013 and was planning to fill another 250 positions. *BNSF Starts Work on Logistics Center in Texas, Opens Economic Development Office in Montana*, PROGRESSIVE RAILROADING (Oct. 23, 2013), http://www.progressiverailroading.com/bnsf_railway/news/BNSF-starts-work-on-logistics-center-in-Texas-opens-economic-development-office-in-Montana--38138.

[4] Montana Rail Link operates has 900 miles of track in Montana and about 1000 employees. *About Montana Rail Link*, MONT. RAIL LINK, https://www.montanarail.com/about.php (last visited Mar. 30, 2017).

[5] The Montana Department of Labor And Industry does not report employment numbers in amounts greater than one thousand. A 2016 article in 247WallSt.com reported that

When one considers that Montana had a total work force of about 440,000 in 2013, and a total private sector work force of about 326,000 in 2011,[6] BNSF accounted for about .5% of total employment in the entire state in 2013, and about .7% of private sector employment in the entire state in 2011. Furthermore, as the Montana Supreme Court observed, the Thirteenth Judicial District, Yellowstone County, found in *Monroy v. BNSF Ry. Co.*, Cause No. DV 13-799 (Aug. 1, 2014) that:

> BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years.... In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum.... In the last

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Walmart was the largest private employer in Montana with 4508 employees. Evan Comen et al., *The Largest Employer in Every State*, 24/7 WALL ST. (Mar. 11, 2016 1:55 PM), http://247wallst.com/special-report/2016/03/11/the-largest-employer-in-every-state/7/.

[6] According to the United States Bureau of Labor Statistics, 447,180 persons were employed in Montana as of May 2015. *May 2015 State Occupational Employment and Wage Estimates Montana*, U.S. BUREAU OF LABOR & STATISTICS, https://www.bls.gov/oes/current/oes_mt.htm#00-0000 (last modified Mar. 30, 2016). Total private sector employment in Montana in 2013 was approximately 339,000. *Quarterly Census of Employment and Wages*, U.S. BUREAU OF LABOR & STATISTICS, https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=14&year=2013&size=0,1,2,3,4,5,6,7,8,9&hlind=10&supp=1 (last modified June 2, 2016).

> year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development.

Pet. App. 4a (footnote omitted).

Thus, BNSF has a substantial, systematic and continuous presence in Montana and has certainly made itself at home there such that it has rendered itself subject to personal jurisdiction in the Montana courts.

BNSF's presence in Montana is far greater than was the presence of the corporate defendants in *Daimler* and *Goodyear*. The claim of personal jurisdiction over against Daimler AG was not predicated on its presence, activities or actions in California, but on those of its subsidiary; the Court described Daimler AG's contacts with California as "slim." 134 S. Ct. at 760. In *Goodyear*, the foreign subsidiaries of the parent company were not registered to do business in North Carolina; they had no places of business, employees, or bank accounts in the state; they did not design, manufacture or advertise products in the North Carolina and did not solicit business or ship tires to North Carolina, although a small percentage of tires manufactured

by the subsidiaries were distributed in the state by Goodyear retailers as a result of custom orders. 564 U.S. at 921. This Court referred to those connections to North Carolina as "attenuated," *id.* at 929, and it rejected the North Carolina court's assertion of personal jurisdiction over the foreign subsidiaries based on their placing their tires in the "stream of commerce" that ultimately carried them to North Carolina, *id.* at 926-27.

BNSF's presence in, and affiliation with, Montana are of a completely different order than the presence and affiliations Daimler AG and the Goodyear subsidiaries had with California and North Carolina; BNSF's connection to Montana is neither "slim" nor "attenuated," it is indeed substantial, systematic and continuous. The Fourteenth Amendment concerns that animated the decisions in *Daimler* and *Goodyear* are not present here. BNSF is not like a mail order company that just ships goods to persons in the state, an appliance manufacturer whose products are merely sold in retail stores in the state, or a transcontinental trucking company who whose drivers only stop in the state for gas and lodging. From their respective beginnings, the railroad has been intertwined with the development of the state. BNSF's predecessors, the Great Northern Railroad and Northern Pacific Railroad, were engaged with Montana before it even was a state,; and they were largely responsible for populating it, and facilitating

its economy.[7] BNSF's own recounting of its history states that the Great Northern Railway laid the rails in the Northwest first and then sought to "colonize" the surrounding areas with farmers and ranchers, describes the pre-railroad Montana as "virtually uninhabited"; and Northern Pacific is depicted as playing a major role in the settling of Montana and the Dakotas and in their admission to statehood. *The History of BNSF: A Legacy for the 21st Century*, BNSF RY., http://www.bnsf.com/about-bnsf/our-railroad/company-history/pdf/History_and_Legacy.pdf (last visited on Mar. 30, 2017), at *20, 30-35.

Over the decades through the present, BNSF has been a major factor in Montana's development and economy; it remains a major landowner, employer and engine of economic growth in the state; it extracts substantial revenue from the transport of natural resources from Montana and derives over $1.7 billion from operations in Montana. JA 37. BNSF is indeed at home in Montana, and the Montana courts properly asserted general personal jurisdiction over BNSF in the FELA cases brought by Mr. Nelson and on behalf of Mr. Tyrrell.

CONCLUSION

For the foregoing reasons, the decision of the Montana Supreme Court should be affirmed.

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[7] RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA, 455-66, 495 (W.W. Norton & Co. ed., 2011); DEE BROWN, HEAR THAT LONESOME WHISTLE BLOW: THE EPIC STORY OF THE TRANSCONTINENTAL RAILROADS, 266-77 (Henry Holt & Co. ed., 1977).

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RECORD AND BRIEFS

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In the

Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, MONTANA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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Montana Chamber of Commerce

National Federation of Independent Business

American Tort Reform Association

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Other Authorities

Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675 (2015) 28

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community. The U.S. Chamber has participated as *amicus curiae* in every significant personal jurisdiction case recently decided by this Court, including *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and has filed briefs in a host of lower federal and state court cases applying those decisions. The U.S. Chamber's recent *amicus curiae* briefs in personal jurisdiction cases are available at http://www.chamberlitigation.com/cases/issue/jurisdiction-procedure/personal-jurisdiction.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the brief's preparation or submission. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

The Montana Chamber of Commerce ("Montana Chamber") is Montana's largest business federation, representing more than 1,500 business members ranging from small, mom-and-pop operations to large corporations. Member businesses participate in virtually every sector of the economy, including retail, manufacturing, tourism, and agriculture. The Montana Chamber works to improve Montana's business climate. As part of its mission, the Montana Chamber files briefs as *amicus curiae* in order to provide courts with the perspective of the broader business community on issues relevant to Montana's ability to attract private sector investment. Indeed, given the importance of this case, the Montana Chamber previously filed an *amicus curiae* brief in support of petitioner with the Montana Supreme Court.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Founded in 1943 as a nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will affect small businesses.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their

resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important liability issues.

SUMMARY OF ARGUMENT

This Court made unmistakably clear in *Daimler AG v. Bauman* that a state court may subject a defendant to general personal jurisdiction only where the defendant's "affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Court explained that, absent "exceptional" circumstances, a "foreign corporation" is "at home," and thus subject to "all-purpose" jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924. And the Court left no doubt that its references to "foreign corporations" and the Due Process Clause extend equally to corporations based in a "sister-state" as well as "foreign-country" corporations. *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

Thus, when respondents—neither of whom are residents of Montana—sued Texas-based petitioner BNSF Railway Company in Montana for claims having no relation to Montana, the cases should have been swiftly dismissed, with the dismissals just as swiftly affirmed on appeal. To be sure, before this Court's recent decisions, BNSF's normal course of

business in Montana might have been mistakenly viewed as sufficient to subject the company to general personal jurisdiction there. But *Daimler* explicitly rejected the notion that a company's "substantial, continuous, and systematic course of business" in a forum could be enough to subject a company to personal jurisdiction on any claim arising anywhere in the world. *Id.* at 761. Indeed, *Daimler*'s rejection of that view of jurisdiction as "unacceptably grasping," *id.*, should have led the Montana Supreme Court to conclude that BNSF is not subject to general personal jurisdiction in Montana.

But old habits die hard, and the Montana Supreme Court "decline[d]" to apply *Daimler*'s straightforward teaching. Pet.App.15a. Instead, the court asserted that the decision had no purchase in BNSF's case because *Daimler* addressed only the narrow question of "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign* defendant based on events occurring entirely *outside the United States*." Pet.App.11a (emphases added). And because BNSF is a U.S.-based defendant, the Montana high court believed that *Daimler* was "factually and legally distinguishable." Pet.App.15a.

As dissenting Justice McKinnon cogently explained, that reasoning is spectacularly flawed. Pet.App.20a-33a. Neither *Daimler* nor the guarantees of the Due Process Clause are limited to international defendants. Indeed, the Court made explicit that its holding applies to both "sister-state" and "foreign-country ... corporations." *Daimler*, 134

S. Ct. at 754. The Montana Supreme Court's contrary conclusion cannot stand.

The Montana Supreme Court's other rationale for subjecting BNSF to general personal jurisdiction in Montana is equally confounding. Respondents alleged violations of the Federal Employers' Liability Act (FELA), which creates a right of action for railroad employees against their employers for injuries that occur on the job. FELA contains a special venue provision that gives plaintiffs a broad selection of federal-court venues, and makes clear that state and federal courts have "concurrent jurisdiction" to hear the federal claims. 45 U.S.C. §56. The Montana Supreme Court held that this *venue* provision "make[s] a railroad 'at home' for *jurisdictional* purposes wherever it is 'doing business.'" Pet.App.12a (emphasis added). But that reasoning mixes apples and oranges. Venue and jurisdiction are fundamentally different matters. "[P]ersonal jurisdiction ... goes to the court's power to exercise control over the parties" and is thus "typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). Moreover, personal jurisdiction, unlike venue, is a fundamental *constitutional* prerequisite for the exercise of adjudicators' power. In short, personal jurisdiction is distinct from venue; when a court cannot exercise personal jurisdiction, that court can never be the appropriate, convenient venue because the court must dismiss the case; and FELA did not and could not expand a state court's power to subject out-of-state defendants to its jurisdiction. Construing FELA otherwise would raise grave

constitutional concerns, counseling strongly in favor of interpreting the relevant FELA provision as this Court has always interpreted it—as a venue provision.

The Montana Supreme Court's conception of general personal jurisdiction is not only irreconcilable with this Court's precedent. It also raises exactly the kinds of unfairness problems that this Court sought to rectify in its previous personal jurisdiction holdings. The Court has repeatedly recognized the practical need for simple and fair jurisdictional rules, and *Daimler*'s test for determining where a defendant is subject to all-purpose jurisdiction fits that bill. These predictable rules help potential defendants structure their conduct, guide potential plaintiffs to an appropriate forum for litigation, and assist all parties (including courts) in efficiently litigating the actual merits of their claims, rather than engaging in costly threshold disputes over where the claims can be heard. Montana's novel approach, on the other hand, demands fact-intensive jurisdictional inquiries and subjects nearly every company that does some business in Montana to the risk that it could be haled into a Montana court for any action it takes anywhere in the world, all premised on the notion that Congress can authorize what the Constitution forbids. The resulting uncertainty fosters massive inefficiencies and is critically unfair for defendants, especially for small businesses, which frequently lack the resources to adequately defend themselves in expensive litigation in distant and unfamiliar forums.

Finally, this case unfortunately is not an isolated anomaly. The Montana court has repeatedly relied on tenuous readings of this Court's precedents to try to exempt the state from rulings of this Court with which it disagrees. And this Court has repeatedly and justifiably rejected those efforts, making clear that the Constitution applies with full force in Montana as it does in every other State. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012). The Montana Supreme Court's attempts to distinguish *Daimler* here are similarly unavailing and warrant the same result. Indeed, the decision below is of a piece with other recent decisions by state supreme courts circumventing this Court's jurisdictional rulings on the flimsiest of grounds. These decisions signal a troubling trend that threatens to undo this Court's jurisprudence and reflects a return to old ways and engrained habits that deny defendants due process. The Court should arrest this nascent movement by soundly repudiating the Montana Supreme Court's decision and holding that constitutional due process is not subject to geographic or statutory carve-outs.

ARGUMENT

I. The Montana Supreme Court's Decision Ignores This Court's Clear Holdings Regarding General Personal Jurisdiction.

The Due Process Clause of the Fourteenth Amendment prohibits a state from authorizing its courts to exercise personal jurisdiction over an out-of-state defendant unless the defendant has "certain minimum contacts with the State such that the maintenance of the suit does not offend 'traditional

notions of fair play and substantial justice.'" *Daimler*, 134 S. Ct. at 754 (brackets omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also* Fed. R. Civ. P. 4(k)(1)(A) (permitting district court jurisdiction over defendant subject to jurisdiction in court of forum state).

"[T]wo categories of personal jurisdiction" guide the application of the minimum contacts test. *Daimler*, 134 S. Ct. at 754. Specific personal jurisdiction applies when the suit "arises out of or relates to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 923-24 (brackets omitted). For a state to exercise specific personal jurisdiction consistent with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

General personal jurisdiction, on the other hand, allows a court to hear "any and all claims against [the defendant]." *Daimler*, 134 S. Ct. at 751. For this "all-purpose" jurisdiction to be appropriate, however, the defendant's "affiliations with the State in which suit is brought" must be "so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Id.* (quoting *Goodyear*, 564 U.S. at 919). Absent "exceptional" circumstances, a corporation is "at home," and thus subject to general jurisdiction, only in the states in which it is incorporated and where it has its principal place of business. *Id.* at 760-61 & n.19; *see also Goodyear*, 564 U.S. at 924.

Daimler put to rest the misconception that state courts could exercise general personal jurisdiction

based merely on "activities in the forum [that] are 'substantial' or 'continuous and systematic.'" *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011). Rejecting that approach as "unacceptably grasping," the Court clarified that the relevant inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761 (brackets omitted) (quoting *Goodyear*, 564 U.S. at 919). Subjecting defendants to general jurisdiction in any other state "would not accord with the 'fair play and substantial justice' due process demands." *Id.* at 763 (quoting *Int'l Shoe*, 326 U.S. at 316).

The Montana Supreme Court's decision blatantly disregards this clear teaching. Petitioner BNSF is a Delaware corporation with its principal place of business in Texas. Plaintiffs sued BNSF not in Delaware or Texas, but in Montana on tort claims that are unrelated to any of BNSF's activity in Montana. Pet.App.3a-4a. BNSF argued that the cases should be dismissed for lack of personal jurisdiction, but the Montana Supreme Court disagreed. Parroting the plaintiffs in *Daimler*, the court held that BNSF could be subject to general personal jurisdiction because "BNSF maintains substantial, continuous, and systematic contacts with Montana." Pet.App.17a. To explain away this Court's recent, on-point decision in *Daimler*, the court asserted that *Daimler* addressed only "the authority of a court in the United States to entertain a claim brought by *foreign* plaintiffs against a *foreign*

defendant based on events occurring *entirely outside the United States*." Pet.App.11a (quoting *Daimler*, 134 S. Ct. at 750) (emphases added). The Montana Supreme Court concluded that because plaintiffs' claims did not involve a defendant from outside the United States or "torts that occur[red] in foreign countries," *Daimler* was "factually and legally distinguishable," and Montana state courts could exercise general personal jurisdiction over BNSF. Pet.App.11a, 15a.

That reasoning is spectacularly flawed. The Montana Supreme Court's tenuous justification for "declin[ing]" to follow the clear meaning of *Daimler* is profoundly misguided at best, and willfully defiant at worst. Pet.App.15a. Nothing in *Daimler* remotely suggests that its holding regarding defendants' due process rights is limited to only international defendants (*i.e.*, those with the most tenuous basis to claim the protections of the Due Process Clause of the United States Constitution, *cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990)), or transnational torts. To the contrary, the Court made clear that the Due Process Clause protects *all* "out-of-state defendants" from "exorbitant exercises of all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 761-62. The Court even made explicit that, when it referred to "foreign" defendants, it meant foreign in the sense relevant for the personal jurisdiction inquiry, namely, any out-of-state defendant, whether based in a "sister-state" or a "foreign-country." *Id.* at 754. There is no basis in the Constitution, this Court's decisions, or common sense for limiting due process protections to only the latter group.

The Montana Supreme Court's decision is even more inexplicable considering how many other federal courts of appeals and state courts of last resort have recognized that "*Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a corporation." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014); *see, e.g.*, *Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015) (noting *Daimler*'s "stringent criteria"); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (noting that, in light of *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business"). Thus, "except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016).

The Montana Supreme Court, however, never suggested that BNSF's case was in any way "exceptional," *Daimler*, 134 S. Ct. at 761 n.19, nor would there have been any grounds for such a holding. This Court has identified only one such "exceptional case"—*Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). *Perkins* involved a Philippines-based corporation that temporarily conducted its business from Ohio during the Japanese occupation of the Philippines in World War II. *Daimler*, 134 S. Ct. at 756 & n.8. The *Perkins* Court held that the company's contacts with Ohio were so continuous and systematic that "Ohio could be considered 'a surrogate for the place of incorporation or head office.'" *Id.* But *Perkins* is the

proverbial exception that proves the rule. Its circumstances are so "exceptional" that, post-*Daimler*, *amici* are aware of no federal circuit court that has permitted an exercise of otherwise unconstitutional general personal jurisdiction under the "exceptional circumstances" carve-out. And given that BNSF operates rail lines in 28 states, Br. for Pet'r 9, "general jurisdiction would be quite the *opposite* of 'exceptional' if such contacts were held sufficient to render the corporation 'at home' in the state." *Brown*, 814 F.3d at 630. Yet the Montana Supreme Court held that BNSF is "at home" in Montana only because it is "doing business" there, Pet.App.12a, a clear confirmation that the court's decision cannot be squared with any reasonable reading of *Daimler*.

II. The Federal Employers' Liability Act Does Not And Could Not Permit The Exercise Of Personal Jurisdiction That The Constitution Prohibits.

The Montana Supreme Court further held that respondents' suits were permissible in Montana state courts because they arose under the Federal Employers' Liability Act (FELA). Thus, according to the Montana Supreme Court, Congress in FELA authorized a state court to exercise general personal jurisdiction over an out-of-state defendant not "at home" in that state. But Congress did no such thing, and if it had, such authorization would be unconstitutional.

FELA makes railroads liable to their "employees in damages for injuries resulting in whole or in part from the fault of 'any of the officers, agents, or

employees' of such carrier." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 328 (1958) (quoting 45 U.S.C. §51). FELA was initially subject to the general venue statute, which fixed venue for suits brought in federal court in the district in which the defendant resided. *See Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Congress later added a venue provision to FELA that provides that plaintiffs may file "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. §56. The same section also makes clear that state courts can entertain FELA actions by providing that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." *Id.* That language was added to abrogate *Hoxie v. New York, New Haven & Hartford Railroad Co.*, 73 A. 754 (Conn. 1909), which had held that the federal courts had exclusive jurisdiction over FELA actions. *See Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 56 (1912).

It is hornbook law that "[t]he question of personal jurisdiction ... goes to the court's power to exercise control over the parties," while the question of "venue ... is primarily a matter of choosing a convenient forum." *Leroy*, 443 U.S. at 180. "This basic difference between the court's power and the litigant's convenience is historic in the federal courts." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). And it is equally well-established in the Montana courts. Indeed, as

recently as 2014, the Montana Supreme Court explicitly recognized that "[p]ersonal jurisdiction and venue are distinct concepts," and "one does not control the other." *In re Guardianship of H.O.*, 337 P.3d 91, 93 (Mont. 2014). "It is possible for jurisdiction to exist though venue is improper, and it is possible for a suit to be brought in an appropriate venue though it must be dismissed for lack of jurisdiction." *Id.*

That black-letter distinction was apparently lost on the Montana Supreme Court here. Instead, the court seized on FELA's venue provision in 45 U.S.C. §56 as a proxy for personal jurisdiction, concluding that "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business.'" Pet.App.12a. This reasoning represents a clear and erroneous conflation of venue and jurisdiction. Venue provisions like 45 U.S.C. §56 do not (and cannot) expand personal jurisdiction; rather, they "come into play only after jurisdiction has been established." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985). Thus, "Congress did not confer personal jurisdiction with the passage of 45 U.S.C. §56." Pet.App.29a (McKinnon, J., dissenting).

The Montana Supreme Court's error is particularly mystifying because this Court has repeatedly recognized that §56 is a "venue act," *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947), that grants the plaintiff "[t]he right to select the forum," *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949). Indeed, in *Kepner*, the Court implicitly recognized that FELA addresses only venue when it

noted that FELA "establishes venue for an action in the federal courts," 314 U.S. at 52, while recognizing that defendants must face FELA actions only "if there is jurisdiction" as well, *id.* at 51.

Attempting to avoid this obvious conclusion, the Montana Supreme Court resorted to equivocation, noting that "45 U.S.C. §56 does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction." Pet.App.14a. But as Justice McKinnon recognized in her dissent, "'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet.App.30-31a (citing statutory and judicial authorities).

Thus, this Court has repeatedly contrasted "concurrent jurisdiction" with "exclusive federal court jurisdiction over cases arising under federal law," a comparison that turns on the *nature* of the claim, not the *territory* or court in which the claim is properly brought. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962); *see also Tafflin v. Levitt*, 493 U.S. 455, 467-68 (1990) (discussing whether "Congress intended exclusive federal jurisdiction" or "concurrent state court jurisdiction" over federal RICO claims); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("[I]f exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it."). And the case law is clear that the language invoked by the Montana Supreme Court was added

to FELA to confirm that state courts had *subject-matter* jurisdiction over FELA suits. *See Mondou*, 223 U.S. at 56. Finally, while Congress has an obvious and legitimate interest in specifying whether federal causes of action can be brought in state court (*i.e.*, addressing subject-matter jurisdiction), it has no obvious business dictating the personal jurisdiction rules of state courts; indeed, doing so raises serious constitutional questions. *See* pp. 17-19, *infra*. Thus, the Montana Supreme Court's indefensible misreading (or willful mischaracterization) of "concurrent jurisdiction" does not support a conclusion that §56 of FELA authorizes general personal jurisdiction over defendants like respondent—or, for that matter, that Congress meant to do anything with respect to personal jurisdiction when it enacted that provision.

The Montana Supreme Court claimed to identify "decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet.App.12a. But as Justice McKinnon correctly noted, the majority "arrive[d] at this conclusion *without citing a single* general jurisdiction case." Pet.App.27a. Instead, the majority relied on two decisions that involved only the issue of whether state courts could enjoin an otherwise legitimate FELA action filed in another state court on grounds that the plaintiff's choice of venue was oppressive or inconvenient, *see Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 383 (1953); *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 699 (1942), and one decision that concerned whether allowing a FELA action to proceed would impose "an undue burden on interstate commerce,"

Denver & Rio Grande W. R.R. Co. v. Terte, 284 U.S. 284, 285 (1932). "These cases do not so much as mention the Due Process Clause or general jurisdiction." Pet.App.28a (McKinnon, J., dissenting).

The Montana Supreme Court's vague appeals to "FELA's purpose" likewise fail to justify the court's reading of the statute. Pet.App.14a. The court noted that if FELA did not empower state courts to hear out-of-state cases against out-of-state defendants, then even a Montana resident would not be able to sue BNSF in Montana state court, a result the court found irreconcilable with "FELA's purpose" of minimizing travel for plaintiffs. *Id.* (citing *Kepner*, 314 U.S. at 49-50). But due process often demands that plaintiffs file suit outside their home state. *See, e.g., Walden*, 134 S. Ct. at 1124 (dismissing for lack of personal jurisdiction a suit by Nevada residents in Nevada despite plaintiffs' "strong forum connections"). And FELA need not deprive defendants of their due process rights to advance its purpose of easing litigation burdens for plaintiffs.

It is clear, therefore, that with FELA, Congress did not authorize state courts to assert personal jurisdiction over out-of-state defendants with no connection to a forum state. It is equally clear, however, that if that were what Congress intended in enacting 45 U.S.C. §56, the statute would be unconstitutional. The Due Process Clause's "personal jurisdiction requirement recognizes and protects an individual liberty interest." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This right to be free from "the burdens of litigating in a distant or inconvenient

forum" is not a second-class right that can be stripped from defendants by Congress. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Rather, just as Congress cannot empower states to abolish jury trials or inflict cruel and unusual punishments, Congress cannot grant states the power to override the Fourteenth Amendment's "restriction on judicial power." *Ins. Corp. of Ir.*, 456 U.S. at 702.

Two canons of statutory construction, however, render it unnecessary for the Court to decide the ultimate question of whether there is some principle that permits Congress, in FELA or elsewhere, to empower state courts to override the due process rights of defendants. First and foremost, "[i]t is a cardinal principle of statutory interpretation ... that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quotation marks omitted); *see also, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). There can be no serious dispute that reading §56 to authorize a state court to exercise general personal jurisdiction over a defendant not "at home" in that state "raises a serious doubt" as to the provision's constitutionality. Construing §56 as "a venue statute for the federal courts, not a grant of personal jurisdiction to state courts," Pet.App.29a (McKinnon, J., dissenting), thus is not only eminently plausible, *see, e.g.*, *S. Pac. Transp. Co. v. Fox*, 609 So.2d 357, 362-63 (Miss.

1992) ("Nothing in [FELA] addresses the matter of personal jurisdiction in the state court."); it avoids the "multitude of constitutional problems," *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), that arise under the contrary interpretation endorsed by the Montana Supreme Court and respondents.

Second, "as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *St. Cyr*, 533 U.S. at 299. Considering that the personal jurisdiction of *federal* courts is generally governed not by statutes directly addressing personal jurisdiction but by the Federal Rules of Civil Procedure and statutes addressing service of process, *see* Br. for Pet'r 30-33, a statute directly authorizing *state* courts to exercise personal jurisdiction surely implicates the "outer limits" of Congress' power. Yet FELA contains no "clear indication" that Congress intended to confer personal jurisdiction on state courts. Section 56 is thus far better read as speaking to venue—like a number of other federal statutes, *see id.* at 32-33—and not personal jurisdiction.

III. The Montana Supreme Court's Decision Reintroduces The Unfairness And Uncertainty This Court Has Sought To Eliminate.

"The Due Process Clause, by ensuring the 'orderly administration of the laws,' ... gives a degree of predictability to the legal system" for potential defendants. *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *Int'l Shoe*, 326 U.S. at 319). And, as the Court has noted, "[p]redictability is valuable to

corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). *Daimler* promoted this predictability for defendants, recognizing that it "is one thing to hold a corporation answerable for operations in the forum State, ... quite another to expose it to suit on claims having no connection whatever to the forum State." 134 S. Ct. at 761 n.19. After all, if corporations could be subjected to all-purpose jurisdiction for merely doing "substantial, continuous, and systematic" business in a state, it would be well-nigh impossible for them "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The Montana Supreme Court cast aside these concerns when it resurrected the "substantial, continuous, and systematic contacts" standard for U.S.-based defendants by means of a statutory carve-out. Pet.App.17a. By allowing "exorbitant exercises of all-purpose jurisdiction," the decision below has created uncertainty for all U.S. businesses operating in Montana, as they face the prospect of being haled into Montana courts to answer for conduct that occurs anywhere in the world. And each day the decision stands, that uncertainty grows for all companies operating in the United States, as the Montana decision serves as a template for enterprising plaintiffs and courts that would seek to limit *Daimler* to only certain causes of action or certain classes of "foreign" defendants in an effort to gain entry to plaintiff-friendly forums. *See, e.g.*, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d

319, 333 (W. Va. 2016) (noting that that "the Court in *Daimler* paid significant attention to the 'transnational context' of the dispute" and remanding for jurisdictional discovery).

The predicament that a company like BNSF now faces illustrates one of the practical reasons for concluding that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. BNSF operates in 28 states and 2 Canadian provinces. Br. for Pet'r 9. Only about 2,000 of the 32,500 miles of railroad track that BNSF operates are located in Montana, and less than 10% of the company's revenue is generated there. Pet.App.63a. But because the Montana Supreme Court carved a gaping hole in *Daimler*, BNSF and other similarly situated defendants can expect to be haled into Montana at least for virtually all FELA claims. Indeed, BNSF is currently facing some three dozen FELA suits just in Montana, which has become a magnet for FELA suits given its plaintiff-friendly procedural and substantive FELA law. *See* Br. for Pet'r 10-13. The unfairness to out-of-state defendants is compounded by the fact that Montana has some of the strictest *pro hac vice* rules in the country; no attorney *or law firm* may appear *pro hac vice* in Montana state court more than twice—ever—absent a showing of good cause. Mont. R. Admission to Bar §6(C). Repeat out-of-state defendants like BNSF are thus severely hampered in their choice of counsel. Finally, once they are haled into Montana state court, FELA defendants like BNSF cannot even avail themselves of removal into federal court, which is forbidden in FELA actions. *See* 28 U.S.C. §1445(a). This inability to remove

FELA actions ordinarily creates no great unfairness because out-of-state defendants lacking sufficient contacts with a forum can raise a defense of improper personal jurisdiction. But if personal jurisdiction limitations are disregarded, as is now the case in Montana, FELA defendants like BNSF face a double dose of unfairness: they can be sued far from home and yet can neither remove to federal court, nor successfully invoke the protections of due process.

The consequences of the Montana Supreme Court's decision may not be limited to FELA, however. If affirmed, the Montana Supreme Court's decision would almost certainly be invoked by enterprising plaintiffs' lawyers bringing other claims that arise from actions BNSF or similarly situated defendants take anywhere else in the United States, if not the world. After all, while this case arises in the FELA context, the Montana Supreme Court's casting aside of *Daimler* did not turn on FELA. Invoking the logic of the decision below, plaintiffs could ask *any* state court to decide that virtually *any* state or federal statute with a generous venue provision authorizes general personal jurisdiction. And if the defendant is a U.S. defendant, the plaintiffs would almost certainly claim that the constitutional limitations this Court has set forth are irrelevant to that statutory construction. The prospect of unpredictable and potentially costly litigation wrought by the decision below is particularly daunting for small businesses, which often lack the resources to adequately defend themselves in distant and unfamiliar forums. Thus, unless this Court reverses the Montana Supreme Court's decision, it will be impossible for BNSF and

other "[potential] defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762.

The Montana Supreme Court's decision also needlessly reintroduces complex factual inquiries into what should be clean-cut jurisdictional analyses. When the Court explained in *Daimler* that a corporation is typically at home only where it is incorporated or has its principal place of business, it noted that these "affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." 134 S. Ct. at 760. Such "[s]imple jurisdictional rules ... promote greater predictability," *id.*, which is beneficial both to potential defendants structuring their affairs and to "plaintiffs deciding [where] to file suit," *Hertz*, 559 U.S. at 95. The Montana Supreme Court's decision, however, moves past these "paradig[m] ... bases for general jurisdiction," *Daimler*, 134 S. Ct. at 760, and requires investigation into whether "[a] nonresident defendant ... maintains 'substantial' or 'continuous and systematic' contacts with Montana." Pet.App.16a. This "factually intensive" inquiry, *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 339 (5th Cir. 1999), is sure to "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims," *Hertz*, 559 U.S. at 94.

Finally, the Montana Supreme Court's decision imposes unnecessary burdens on state courts—especially trial judges—opening them up to claims

that have nothing to do with their state. Indeed, one of the trial court judges below complained that he alone had "about 12 FELA cases pending where the Plaintiff is not a Montana resident and where there are no Montana related acts or omissions." Pet.App.36a-37a. While "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," *Burger King*, 471 U.S. at 473—albeit an interest that cannot negate an out-of-state defendant's due process rights—Montana has no similar interest in ensuring that nonresident plaintiffs are made whole by nonresident defendants. *Cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987) ("Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*."). Thus, fair play, substantial justice, and good sense dictate that such claims be brought where the cause of action arises or where the defendant is at home.

IV. The Decision Below Reflects A Pattern Of State Courts' Evading This Court's Jurisdictional Holdings.

"[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quotation marks omitted). Thus, when this Court issues "an authoritative interpretation" of federal law, "the judges of every State must follow it." *Id.*; *see also* U.S. Const. art. VI, cl. 2 ("[T]he Judges in

every State shall be bound" by "the Laws of the United States").

Daimler made clear that, except "in an exceptional case," an out-of-state corporate defendant can be properly subjected to general personal jurisdiction only where it has "its formal place of incorporation or principal place of business." 134 S. Ct. at 761 n.19. The Montana Supreme Court's reasons for nevertheless exercising general personal jurisdiction over an out-of-state defendant "fail to meaningfully distinguish that case." *Bullock*, 132 S. Ct. at 2491.

This is not the first time the Montana Supreme Court has relied on demonstrably dubious reasoning to defy the decisions of this Court. Just a few years ago, the Montana Supreme Court's willingness to discard controlling Supreme Court precedent was on display when the Montana court attempted to exempt Montana from the reach of *Citizens United v. FEC*, 558 U.S. 310 (2010). *See W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1 (Mont. 2011). Plaintiffs brought a First Amendment challenge to a Montana state law that prohibited "political expenditures by corporations on behalf of or opposing candidates for public office." *Id.* at 3. The Montana Supreme Court recognized that "[a] premise of *Citizens United* was that First Amendment protections extend to corporations." *Id.* at 5. But the court maintained that "*Citizens United* was a case decided upon its facts, and involved 'unique and complex' rules" that applied to federal elections. *Id.* The court then identified several aspects of Montana's history, economy, and geography that

allegedly established that "Montana has unique and compelling interests" sufficient to sustain the statute under *Citizens United*. *Id.* at 11.

Two justices dissented. Justice Baker accused the majority of "inventing distinctions in what I fear will be a vain attempt to rescue Montana's" law. *Id.* at 14. Justice Nelson was even more critical, assailing the majority's "decision to parse *Citizens United* in a fashion so as to 'send a message' to, or be the next 'test case' before, the Supreme Court." *Id.* at 36. He blasted the majority's attempt to "render Montana exempt from *Citizens United*," as "disingenuous." *Id.* at 17, 36. He concluded by forecasting that, "[w]hen this case is appealed to the Supreme Court, ... a summary reversal on the merits would not surprise me in the least." *Id.* at 36 (citation omitted).

Fewer than six months later, this Court made Justice Nelson's warning prophetic and summarily reversed. *Bullock*, 132 S. Ct. at 2491. The Court held that "[t]here can be no serious doubt" that "the holding of *Citizens United* applies to the Montana state law." *Id.* The Court noted that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Id.*

The Montana Supreme Court has also tried to exempt Montana from this Court's Federal Arbitration Act jurisprudence. In *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), the court refused to enforce a contractual arbitration provision because the provision did not comply with a state law that required arbitration provisions to appear on the

front page of a contract. This Court granted, vacated, and remanded that decision for further consideration in light of *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995), which reaffirmed that, under the FAA, states could invalidate arbitration clauses only on grounds that apply equally to any contract. *Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995). On remand, even though the Montana law clearly "singl[ed] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Montana Supreme Court simply reinstated its opinion "without inviting or permitting further briefing or oral argument," *id.* at 686. This Court swiftly granted certiorari and reversed, holding that the Montana law was preempted by the FAA. *Id.* at 688-89.

While the Montana court's questionable reasoning in *Casarotto* could be interpreted as a subtle attempt to test the boundaries of this Court's reasoning, the reactions of two Montana justices to the Court's second decision in the case made clear that outright insubordination drove their decisionmaking. After this Court sent the case back to the Montana Supreme Court a second time, two of the court's justices refused to sign a routine order remanding for further proceedings; they proclaimed that they could not "in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United States Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16.

The Montana Supreme Court's decision here is of a piece with those earlier decisions. The court unconvincingly parsed *Daimler* in an effort to give it the minimum possible impact, implausibly limiting it to purely international disputes. But "foreign" in the personal jurisdiction context is used in contradistinction to the domestic or home-state forum and is synonymous with "out-of-state." Indeed, *Daimler* explicitly applies to both "sister-state" and "foreign-country ... corporations." 134 S. Ct. at 754. Likewise, the court disregarded basic hornbook law when it concluded that FELA's venue provision could expand personal jurisdiction at the expense of defendants' constitutional rights. In short, just as "[t]here is no 'Montana exception'" to *Citizens United*, *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting), there are no statutory or geographic exceptions to *Daimler*.

The Montana Supreme Court is not alone in resisting the clear import of *Daimler*. While the Montana Supreme Court attempted to circumvent *Daimler* by recasting principles of general personal jurisdiction, several other courts similarly seeking "to mitigate the consequences of *Daimler*'s restrictions on general jurisdiction" have resorted to "a more liberal view of 'related contacts' for specific jurisdiction." Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 685 (2015). In so doing, the highest judicial tribunals in several other states have begun to dismantle this Court's careful limits governing state courts' exercise of personal jurisdiction and, consequently, to sow

widespread confusion over the constitutional boundaries.

For example, the Supreme Court of California has sought to eviscerate the limits set by this Court on general jurisdiction through a sweeping expansion of specific jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016), *cert. granted*, No. 16-466, 2017 WL 215687 (U.S. Jan. 19, 2017) (mem.), the court addressed claims against nonresident defendants wholly unrelated to the defendants' contacts with California. This Court's decisions in *Daimler* and *Goodyear* foreclosed any reliance on general jurisdiction because the nonresident defendants were not "at home" in California, and indeed the California Supreme Court held that general jurisdiction would not lie. *Id.* at 883-84. Remarkably, though, the Court did not dismiss the claims. Instead, after paying lip service to this Court's recent general jurisdiction jurisprudence, a badly divided court effected a blatant end-run around those decisions by adopting a capacious specific jurisdiction theory manufactured from whole cloth. Specifically, it announced a "sliding scale approach to specific [personal] jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim," such that specific personal jurisdiction may be appropriate even in the absence of a direct factual relationship between the plaintiffs' claims. *Id.* at 889.

Similarly, two recent decisions from the Supreme Court of Texas have chipped away at other bedrock

principles of personal jurisdiction. First, in *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, 493 S.W.3d 65 (Tex.), *cert. dismissed*, 137 S. Ct. 615 (2016), the court weakened the rule that due process must be satisfied as to each defendant, *see, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). *Cornerstone* addressed whether specific personal jurisdiction could be asserted over nonresident partnerships that had established nonresident subsidiaries to facilitate the purchase of assets in Texas. While this Court in *Daimler* and *Goodyear* suggested that one party's contacts can be imputed to another party under very limited circumstances, the *Cornerstone* plaintiffs waived reliance on that theory, which should have ended the case. But the Supreme Court of Texas upheld specific personal jurisdiction because the partnerships had "targeted Texas assets in which to invest and sought to profit from that investment." 493 S.W.3d at 73-74. Second, in *T.V. Azteca S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), *petition for cert. filed*, No. 16-481 (U.S. Oct. 7, 2016), the court adopted a broad version of the "effects" test that this Court had conspicuously narrowed in *Walden*, thereby permitting nonresident defendants' alleged efforts to "serve the market" in Texas to satisfy specific personal jurisdiction. *Id.* at 46.

These recent cases underscore the need for the Court in *this* case to emphatically reaffirm its "authoritative interpretation" of the Due Process Clause to ensure that "the judges of every State ... follow it." *DIRECTV*, 136 S. Ct. at 468. To effect an end-run around fundamental personal jurisdiction principles articulated by this Court, the Montana

Supreme Court brazenly ignored *Daimler*'s clear teaching on personal jurisdiction and suggested that Congress may authorize what the Constitution clearly prohibits. As Justice Nelson of the Montana Supreme Court recognized when he broke with his colleagues five years ago, a state court must resist the "call ... to thumb its nose at the federal government, to disregard federal law, and to boldly ignore the Supremacy Clause." *W. Tradition*, 271 P.3d at 19 (Nelson, J., dissenting). And when, as here, a state court has ignored federal law, it is imperative that the Court make clear that its decisions must be followed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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No. 16-405

IN THE SUPREME COURT OF THE UNITED STATES

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,
Respondents.

On Writ of Certiorari
To the Supreme Court of Montana

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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TABLE OF AUTHORITIES

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CASES

Anderson v. BNSF Ry., 354 P.3d 1248 (Mont. 2015) 17

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Baltimore & Ohio R.R. Co. v. Kepner, 314 U.S. 44 (1941) 9

Barrett v. Union Pacific R.R. Co., 361 Or. 115 (Or. 2017) 12, 14

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 16

Burnham v. Super. Ct., 495 U.S. 604 (1990) 12-13

Daimler AG v. Bauman, 134 S. Ct. 746 (2014) ..... *passim*

Duncan v. Louisiana, 391 U.S. 145 (1968) 23

Genuine Parts Co v. Cepec, 137 A.3d 123 (Del. 2016) 20-21

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) ..... *passim*

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 7

Honda Motor Co., Ltd. v. Oberg,
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Imm v. Union R.R. Co.,
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In re Asbestos Litig.,
929 A.2d 373 (Del. 2006) 20

Int'l Shoe Co. v. Washington,
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Kulko v. Super. Ct., 436 U.S. 84 (1978) 6

Leroy v. Great Western United Corp.,
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Schwarzenegger v. Fred Martin Motor Co.,
374 F.3d 797 (9th Cir. 2004) 5

Shaffer v. Heitner, 433 U.S. 186 (1977) 16

State ex rel. Norfolk Southern Ry. Co. v. Dolan, -- S.W.3d --, 2017 WL 770977
(Mo. Feb. 28, 2017) 12, 14

Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) 23

TXO Prod. Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 22

Walden v. Fiore, 134 S. Ct. 1115 (2014) 6

Weisblum v. Prophase Labs, Inc.,
88 F.Supp.3d 283 (S.D.N.Y. 2015) 20

STATUTES

45 U.S.C. § 56 9

OTHER AUTHORITIES

Am. Tort Reform Found.,
Judicial Hellholes (2016) 178

Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002 17

Mark A. Behrens & Cary Silverman, *Improving the Jury System in Virginia: Jury Patriotism Legislation is Needed*, 11 Geo. Mason L. Rev. 657 (2003) 22-23

Andrew Cohen, *At State Courts, Budgets Are Tight and Lives Are in Limbo*, The Atlantic, Sept. 23, 2011 23

Amaris Elliott-Engle, *Common Pleas Court Seeing More Diabetes Drug Cases*, Legal Intelligencer, Mar. 19, 2009 18

Amaris Elliott-Engle, *Philadelphia Courts May See Substantial Layoffs*, Legal Intelligencer, Jan. 29, 2009 18

Federal Practice and Procedure § 3801 (1976) 10

Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists,* Bloomberg Businessweek, Sept. 29, 2016..... 19

Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents,* Madison-St. Clair Record, Mar. 23, 2016 18

William R. Hanlon & Richard M. Wyner, Commentary: *Daimler Turns Two: Personal Jurisdiction Over Out-Of-State Mass Tort Defendants in the Wake of Daimler AG v. Bauman,* Mealey's Litig. Rep.: Asbestos, vol. 31, no. 5, Apr. 13, 2016 11

Daniel Klerman & Greg Reilly, *Forum Selling,* 89 S. Cal. L. Rev. 241 (2016) 21

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts,* 39 Ariz. L. Rev. 595 (1997) 22

Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady,* Legal Intelligencer, July 25, 2016..... 19

Mark D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases,* 11-7 Mealey's Asb. Bankr. Rep. 24 (2012)..... 18

Restatement (Second) of Conflict of Laws § 36, Comment (c) (1971)..... 23

Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 Fordham L. Rev. 843 (1993) 6

Richard Y. Schauffler & Matthew Kleiman, *State Courts and Budget Crisis: Rethinking Court Services,* The Book of the States 2010 23

Cary Silverman & James Muehlberger, The Food Court Trends in Food and Beverage Class Action Litigation (U.S. Chamber Inst. for Legal Reform 2017) 20

Dmitry Slepov, *Micromanufacturing the Future*, Tech Crunch, Apr. 3, 2016 13

Roger Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 Geo. Wash. L. Rev. 849 (1989)..... 6

U.S. Chamber Inst. for Legal Reform, 2015 Lawsuit Climates Survey: Ranking the States (2015) 15

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation.

NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. NAM is concerned that courts are creating unwarranted exceptions to this Court's decisions constraining general, all-purpose jurisdiction. As a result, manufacturers may be subject to the jurisdiction of courts in states that have little or no relationship to the lawsuit and that unfairly subject them to liability exposure that is greater than other states.

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[1] Pursuant to Rule 37.6, counsel for NAM certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than the NAM, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Petitioner and Respondents have provided blanket consent to the filing of amicus briefs in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has solidified constitutional limits for general personal jurisdiction to properly reflect a modern economy in which even small businesses regularly engage in commerce throughout the United States. As a matter of due process, a state can exercise general personal jurisdiction over a business only where the business is "at home," namely its place of incorporation or principal place of business. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). This approach properly balances the jurisdictional requirements of the Due Process Clause with the rights of states to adjudicate claims implicating their interests.

Here, the Supreme Court of Montana did not apply these constitutional limits. It created unsupported exceptions to *Daimler* and *Goodyear*, ruling that the "at home" requirement applies only to foreign (outside the United States) defendants and that the Federal Employers Liability Act's (FELA) venue provision supersedes constitutional due process limits on personal jurisdiction. This result conflates general and specific jurisdiction. It also risks unleashing broad general jurisdiction principles that will subject businesses to all-purpose liability in a multitude of states despite having only limited connections in many of them. As this Court has recognized, manufacturers, like people, have a choice of where to locate, and they did not choose to be subject to the laws and courts of all of these states for all purposes.

This Court should reverse the Montana Supreme Court to enforce *Daimler* and *Goodyear* and prevent

states from circumventing the firm constitutional check on where businesses can be subject to broad liability in claims involving their products or operations. First, the Court should make clear that the tightened "at home" requirement for general personal jurisdiction applies to domestic and foreign defendants alike. If domestic corporations cannot avail themselves of the "at home" requirement, manufacturers and other companies based outside the United States will have protections under the U.S. Constitution that are not provided to their domestic counterparts. The Court should not endorse this competitive disadvantage to domestic businesses, including manufacturers, and the Court did not signal any intent in *Daimler* to create such a distinction.

Second, the Court should clarify that personal jurisdiction over a defendant cannot hinge on the legal theory or statutory claim a plaintiff invokes. If the Montana Supreme Court's opinion is upheld, state courts could use FELA or other statutes to weaken a defendant's due process protections in ways that can greatly undermine the central purpose of this Court's general jurisdiction jurisprudence: to assure the location of a lawsuit does not subvert "traditional notions of fair play and substantial justice." *Daimler*, 134 S. Ct. at 754 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1987); *see also Asahi Metal Indus. v. Super. Ct.*, 480 U.S. 102, 114 (1987) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Experience has shown that when plaintiffs engage in forum shopping, justice can be distorted and local judicial resources abused. Here, Montana has become a favored destination for certain FELA cases

because its courts generously interpret FELA's statute of limitations, giving new life to claims that would be untimely in the proper jurisdictions. Other courts have become magnets for other types of claims, such as asbestos litigation, prescription drug product suits, and consumer protection claims. Plaintiffs should not be able to circumvent the courts and laws that are supposed to govern their claims. They also should not burden courts, juries, and taxpayers with cases having nothing to do with anyone, anything, or any event in their communities.

For these reasons, and those explained below, NAM respectfully urges the Court to ensure that Montana and other states adhere to this Court's well-reasoned general jurisdiction jurisprudence. American manufacturers and other businesses should not be subject to doctrines of general jurisdiction that violate their due process rights.

ARGUMENT

I. MONTANA'S ASSERTION OF GENERAL JURISDICTION VIOLATES THE CLEAR, DEMANDING "AT HOME" STANDARD

Specific jurisdiction is the preferred mechanism for a court to exercise personal jurisdiction over a defendant. It "encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 748-49 (internal quotation and alterations omitted).[2] Because

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[2] In products liability cases, for example, "it is the defendant's purposeful availment [of the benefits and protections of state law] that makes jurisdiction consistent with 'traditional notions of fair play and substantial jus-

courts can exercise specific jurisdiction only over claims related to these contacts, it unifies the defendant- and community-based interests in a case. These limits ensure that courts and juries perform their respective responsibilities and expend their finite resources only when the community has a meaningful stake in the alleged wrongdoing.

By contrast, general, all-purpose jurisdiction is proper only when the defendant's contacts are so extensive in a jurisdiction that it is eminently fair to require the defendant to answer to any and all allegations in the forum state.[3] This Court has held that general jurisdiction is appropriate for a business only where it is "at home," namely where it is incorporated or has established its principal place of business (or a surrogate principal place of business). General jurisdiction is the exception, not the rule. Courts are not to exercise jurisdiction over a case when, as here, the defendant is not "at home," and the incident, people, and evidence are located hundreds or thousands of miles away.

A. The Court's Exacting Standard for General Jurisdiction Is Based on the Defendant's Choice of Where to "Reside"

This Court has long held that the Due Process Clause of the Fourteenth Amendment prescribes the

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tice.'" *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (quoting *Int'l Shoe*, 326 U.S. at 316).

[3] *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) ("[A] finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.").

circumstances when it is proper for a state to assert both specific and general jurisdiction over a defendant. *See Kulko v. Super. Ct.*, 436 U.S. 84, 91 (1978) (stating the Due Process Clause "operates as a limitation on the jurisdiction of state courts" against defendants). Either type of jurisdiction is appropriate only when the defendant establishes a meaningful relationship with that state. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) ("[I]t is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."). A state cannot force itself into a dispute when neither the case nor defendant has such a connection. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (holding a state may not exercise jurisdiction over a "corporate defendant with which the state has no contacts, ties, or relations").

For general jurisdiction, the Court's jurisprudence is based on the notion that a defendant makes a conscious choice where to "reside." *See* Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 Fordham L. Rev. 843, 843 (1993) ("[Firms] seek to incorporate in the state whose code best matches their needs."). When a defendant, including a business, chooses a state, it consents to the laws and judgment of that state. *See* Roger Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 Geo. Wash. L. Rev. 849, 905-06 (1989) (linking consent to purposeful availment). General jurisdiction, therefore, is a *quid pro quo*, a reciprocal situation in which a defendant fully submits itself to jurisdiction in exchange for the jurisdiction's benefits. A business cannot be brought into a state's courts for any and all claims if it has not ac-

cepted this bargain. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 416 (1984).

In the past few years, the Court set forth the "at home" standard for general jurisdiction for when a business has accepted this broad *quid pro quo*. *See Daimler*, 134 S. Ct. at 760. This standard provides a clear and demanding test for when a state court is permitted to exercise general jurisdiction over a business. This high bar is needed because general jurisdiction makes a business subject to all manner of litigation in the state. When a court invokes general jurisdiction it does so over a dispute that has not arisen from anything specific to the state; the state is asserting jurisdiction over the business *despite the fact* that the claim arose elsewhere.

In *Daimler*, the Court also made clear that the "at home" test replaced the "continuous operations" test from previous rulings. 134 S. Ct. at 761. It acknowledged that the "continuous operations" terminology sounded similar to the "continuous and systematic" test for specific jurisdiction. *Id.* The Court clarified that the general jurisdiction inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home." *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919) (internal quotes omitted). A business, such as BNSF here, may have "substantial, continuous, and systematic" activities in a state, but it is not "at home" unless its principal place of business or incorporation is there.

It is abundantly clear that this standard has not been met in the case at bar; BNSF is not "at home" in

Montana. It never availed itself of Montana laws such that it could be subject to lawsuits there when a plaintiff does not reside in Montana and the injury and related events occurred outside Montana. It has not come close to the standard of connectedness needed for general jurisdiction.

B. Constitutional Protections Against a State's Improper Imposition of General Jurisdiction Cannot Be Abrogated by Statute or Limited to Foreign Businesses

The Supreme Court of Montana found that a non-resident company that has some operations in Montana may, nonetheless, be subject to general jurisdiction under two exceptions: if a plaintiff brings suit under FELA or if the defendant is a U.S.-based business. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6 (Mont. 2016). Since the Court's unambiguous rejection of the "continuous and systematic" test in *Daimler*, basing any general jurisdiction determinations on the level of contacts or operations a business has in a state encroaches into the arena that is now exclusively reserved for specific jurisdiction. Further, neither of Montana's carve-outs comports with this Court's well-established rules of general jurisdiction. Because protections against improper imposition of general jurisdiction are rooted in the U.S. Constitution, they cannot be altered by statute and must be applied to domestic and foreign companies alike.

First, because general jurisdiction's constitutional bounds are dependent on the relationship between the forum state and the defendant, the doctrine cannot be altered by the legal theory a plaintiff invokes, including the one here under the FELA statute. The scope of a defendant's constitutional right to due pro-

cess is not limited by the source of the liability, the elements of a cause of action, or a plaintiff's pleading strategy. The "at home" constitutional standard for general jurisdiction applies uniformly in all cases. Congress cannot, by statute, force parties to surrender their constitutional protections. Otherwise, any number of federal and state laws could be misread to overcome the lack of a connection between the defendant and state needed for general jurisdiction.

Here, the Montana court set aside BNSF's constitutional protections with respect to general jurisdiction based on a FELA venue provision. FELA provides state courts with concurrent subject matter jurisdiction with the federal courts in deciding cases involving injuries to railroad workers. *See* 45 U.S.C. § 56. In determining the appropriate venue for such a case, FELA provides that the action "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.*; *see also Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941) (recognizing Section 56 "establishes venue for an action in the federal courts"); *Imm v. Union R.R. Co.*, 289 F.2d 858, 859 (3d Cir. 1961) (agreeing with railroad that 45 U.S.C. § 56 "is a venue provision and does not have anything to do with jurisdiction").[4]

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[4] Even if FELA addressed personal jurisdiction, due process rights are not subordinate to statute. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) ("As a general rule, neither statute nor judicial decree may bind strangers to the state."). Congress cannot predetermine the weight a state must give to a defendant's

As this Court has long appreciated, personal jurisdiction and venue are entirely distinct concepts. "[P]ersonal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (citing C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3801, pp. 5-6 (1976)). Because personal jurisdiction is based solely on the relationship between a defendant and a state, it "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).[5] No precedent of this Court has ever held that Congress can affect the personal jurisdiction of state courts. FELA and other statutes can authorize states to exercise jurisdiction only when consistent with the U.S. Constitution.

Second, the Montana court held the "at home" requirement established in *Goodyear* and affirmed in *Daimler* was intended to apply only to foreign (outside the United States) defendants. *See Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6 (Mont. 2016) (limiting the "at home" limitation to "a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States"

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contacts through statute and, thereby, do away with the case-by-case approach in which personal jurisdiction is predicated. *See id.*

[5] Congress's grant of subject matter jurisdiction also cannot be seen as an excuse to "enlarge or regulate the jurisdiction of state courts." *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 56-57 (1912).

(quoting *Daimler*, 134 U.S. at 750)). *Goodyear* arose out of a bus accident in France involving an allegedly defective tire made and sold abroad. *Daimler* arose in the context of an Alien Tort Statute claim with Argentinean plaintiffs suing a German corporation. Yet, nothing in these opinions limited the application of constitutional constraints on general jurisdiction to claims arising outside the United States.

If not corrected by this Court, this case will establish a beachhead for states and plaintiffs alike to improperly limit *Daimler* "to overseas, non-American plaintiffs, an overseas corporate defendant, or both." *See* William R. Hanlon & Richard M. Wyner, Commentary: *Daimler Turns Two: Personal Jurisdiction Over Out-Of-State Mass Tort Defendants in the Wake of Daimler AG v. Bauman*, Mealey's Litig. Rep.: Asbestos, vol. 31, no. 5, Apr. 13, 2016. Such a result has no constitutional basis and would put American businesses at a competitive disadvantage. The inquiry into a defendant's affiliation with a forum state for purposes of general jurisdiction is common to domestic and foreign defendants. Domestic manufacturers and other businesses must be given U.S. constitutional protections provided to their counterparts based outside the United States.

In short, Montana cannot assert general personal jurisdiction over BNSF. This case should be heard, preferably where a state can assert specific jurisdiction over the claim, or, if needed, where general jurisdiction actually exists.

C. The Court's Grant of *Certiorari* Here Has Already Positively Impacted State Courts

The Montana Supreme Court ruling here is quickly becoming a minority, disfavored view of this Court's general jurisdiction jurisprudence. In the week between the filing of Defendant's brief and this *amicus* brief, the Supreme Courts of Missouri and Oregon issued rulings directly disagreeing with Montana's unfounded exceptions to the Court's general jurisdiction jurisprudence. *See State ex rel. Norfolk Southern Ry. Co. v. Dolan*, -- S.W.3d --, 2017 WL 770977 (Mo. Feb. 28, 2017); *Barrett v. Union Pacific R.R. Co.*, 361 Or. 115 (Or. Mar. 2, 2017).

These cases remarkably parallel the case at bar. They both involved plaintiffs who are seeking to subject out-of-state defendants to general jurisdiction under FELA. The Oregon court specifically took notice of the Court's grant of *certiorari* in this case. *Barrett*, 361 Or. at 132 (stating it "reach[ed] a different conclusion from the Montana Supreme Court, which relied on earlier 'doing business' cases"). The Missouri court concurred, finding that arguments akin to ones here "blur the distinction between general and specific jurisdiction as well as between jurisdiction and venue." *Dolan*, 2017 WL 770977, at *8. Overturning the ruling below would be fully within the settled expectations of most state courts.

II. INTERCONNECTIVITY IN THE MODERN ECONOMY UNDERSCORES THE NEED TO LIMIT GENERAL JURISDICTION

This Court has a long tradition of tailoring constitutional general jurisdictional safeguards to the economic realities of its time. *See Burnham v. Super.*

Ct., 495 U.S. 604, 617 (1990) (recognizing that jurisdiction jurisprudence has historically reflected "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity"). The "at home" standard in *Goodyear* and *Daimler* properly embraces the manner in which manufacturers and other companies are doing business today.

The U.S. economic marketplace is global in nature, allowing manufacturers of all sizes to purchase materials, as well as make and sell products across the country. There are more than 250,000 manufacturers in the United States and, in 2015, they collectively generated more than $2 trillion. *See* Nat'l Ass'n of Manufacturers, United States Manufacturing Facts, Oct. 2016.[6] Three-quarters of manufacturing firms have less than twenty employees. *See* Anthony Caruso, Statistics of U.S. Businesses Employment and Payroll Summary: 2012, at 7 (2015). Only about six percent of manufacturers exceed one hundred employees. *See id.* Further, the trend is for manufacturers to make products in America in small quantities in small facilities. *See* Dmitry Slepov, *Micromanufacturing the Future*, Tech Crunch, Apr. 3, 2016.[7] Although a manufacturer's operations may be centered in one or two states, in today's internet era, most manufacturers—large or small—buy parts and make volumes of sales throughout the country.

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[6] http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/State-Manufacturing-Data/October-2016/Manufacturing-Facts--United-States/.

[7] https://techcrunch.com/2016/04/03/micromanufacturing-the-future/.

Thus, a manufacturer or other business may have "substantial, continuous, and systematic" activities in a state, but not be "at home" there. The case at bar involves a railroad company that operates in 28 states. In the Missouri case decided last week, the court found that Norfolk, which is a Virginia-based company, had "substantial and continuous business" in 22 states. *Dolan*, 2017 WL 770977, at *2. The Oregon case found that Union Pacific, which is incorporated in Delaware and based in Nebraska, has operations in 23 states. *Barrett*, 361 Or. at 118. A business is not to be subject to general jurisdiction in all of the places wherever its goods or services routinely flow. *See Nicastro*, 564 U.S. at 882; *Daimler*, 134 U.S. at 760-61.

For example, a manufacturer that makes computers in California should not be subject to general jurisdiction in New York simply because consumers there purchase its laptops. A company making airplanes in Washington should not be compelled to appear in an Illinois court based on planes regularly flying into Chicago. A food producer in Iowa should not be subject to jurisdiction in Florida because people buy its food in supermarkets there. A pharmaceutical maker based in Indiana should not face lawsuits in Pennsylvania solely based on the quantity of prescriptions filled in the state. A company that makes cars in Michigan should not face all-purpose jurisdiction in any state in which its cars are sold. They should be subject to liability in these places only when the courts can exercise specific jurisdiction with regard to a specific claim, *i.e.*, when the claim has some connection to the forum.

In this national economy, the Court has appreciated, "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *See Daimler*, 134 S. Ct. at 762 n.20. Many companies cannot afford the cost, business interruptions, and liability exposure of trying cases in far-away jurisdictions. *See Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987) (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system"). By contrast, a business's state of incorporation and principal place of business will ordinarily be only one or two places. The Court has called these locations the "paradigm all-purpose forums" for general jurisdiction. *Id.* at 760. They are "easily ascertainable" and the only ones appropriate for subjecting a company to liability regardless of the cause of action. *Id.*

The predictability that this standard provides is also in concert with the notion discussed above that a defendant can choose which jurisdiction to be subject to all-purpose liability. When manufacturers and other businesses consider where to incorporate and locate their principal place of business, the certainty of legal exposure and risks have now become significant factors. *See* U.S. Chamber Inst. for Legal Reform, 2015 Lawsuit Climates Survey: Ranking the States 3-4 (2015) (finding 75 percent of respondents reported that a state's litigation environment is likely to impact important business decisions, such as where to locate or do business).[8] Businesses "structure their primary conduct with some minimum as-

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[8] http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf.

surance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)); *see also Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) (recognizing due process requires a defendant to have "fair warning" as to where it may be subject to jurisdiction).

When the Montana Supreme Court unhinged general jurisdiction from the "at home" requirement, it created a recipe for national general jurisdiction. Such an expansive notion of general jurisdiction could quickly become the norm, leading companies large and small to be haled into courts all across the nation regardless of any meaningful connection to the forum. Such a result would undermine the ability of manufacturers and other companies to manage their businesses and contravenes this Court's admonition that subjecting a business to general jurisdiction in a multitude of states would be an "exorbitant exercis[e] of all-purpose jurisdiction." *Daimler*, 134 S. Ct. at 761. The Court must reassert that the boundaries established in *Daimler* apply in all cases, and cement the predictability of jurisdiction in furtherance of fairness and the American economy.

III. EXPANDING GENERAL JURISDICTION FACILITATES FORUM SHOPPING

The Court should also overturn the Montana Supreme Court's ruling to send a clear message against improper forum shopping. This ruling exemplifies the jurisdictional gamesmanship threatening "traditional notions of fair play and substantial justice." *Daimler*, 134 S. Ct. at 754 (quoting *Int'l Shoe*, 326 U.S. at 316). Montana has become a destination for

FELA claims because the Montana Supreme Court has adopted a more liberal interpretation of the statute of limitations than several federal circuits. *See Anderson v. BNSF Ry.*, 354 P.3d 1248 (Mont. 2015), *cert. denied*, 136 S. Ct. 1495 (2016). Montana courts also have a reputation for "empathizing with injured railroad workers" compared with courts in other states. Paul Bovarnick, *On the Tracks: Helping Injured Railroad Workers*, Trial Lawyer, at 33 (Fall 2012) ("[O]nce the railroad realized we could file . . . in Great Falls, they offered a generous settlement.").[9]

Such forum shopping has become all too common. In violation of fair play and justice, manufacturers and other businesses are routinely sued in jurisdictions with little or no connection to the lawsuits. One former plaintiffs' lawyer called these "magic jurisdictions." Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (quoting Richard Scruggs). A tort reform group is less diplomatic in naming these jurisdictions "Judicial Hellholes." *See* Am. Tort Reform Found., Judicial Hellholes (2016).[10]

The quintessential example of forum shopping is in asbestos litigation. Any manufacturer with a remote historic connection to an asbestos-containing product or workplace faces lawsuits in Madison County, Illinois, which hosts one-quarter of the nation's asbestos litigation. *See* KCIC, Asbestos Litiga-

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[9] http://www.rsblaw.net/beta/wp-content/uploads/2015/06/On-the-tracks_helping-injured-rr-workers.pdf.

[10] https://goo.gl/GqgU2Q.

tion: 2016 Mid-Year Update (2016), at 3.[11] Very few of these claims, though, have any connection to Madison County. In 2015, only 75 of 1,224 asbestos cases filed there were on behalf of Illinois residents with only six cases involving Madison County residents. *See* Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents,* Madison-St. Clair Record, Mar. 23, 2016. Warehousing of claims in chosen jurisdictions is a major reason asbestos litigation, which should have been in decline, is growing in scope and intensity and has driven numerous companies into bankruptcy. *See generally* Mark D. Plevin, et al., *Where are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11-7 Mealey's Asb. Bankr. Rep. 24 (2012).

For a number of years, Philadelphia, Pennsylvania became the prime location to file lawsuits against pharmaceutical manufacturers. In 2009, the Common Pleas President Judge undertook a "public campaign to lay out the welcome mat for increased mass torts filings." Amaris Elliott-Engle, *Common Pleas Court Seeing More Diabetes Drug Cases*, Legal Intelligencer, Mar. 19, 2009, at 1; *see also* Amaris Elliott-Engle, *Philadelphia Courts May See Substantial Layoffs*, Legal Intelligencer, Jan. 29, 2009 (reporting the plan to make the Complex Litigation Center for mass torts more attractive to attorneys to "tak[e] business away from other courts"). In 2015, out-of-state plaintiffs accounted for 81 percent of new pharmaceutical cases filed in the Philadelphia

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[11] http://riskybusiness.kcic.com/wp-content/uploads/2016/09/KCIC-Asbestos-Mid-Year-Report-2016-1.pdf

courts, with that number dipping to 65 percent in 2016. *See* Max Mitchell, *Out-of-State Pharma Filings Dip as Phila. Mass Torts Remain Steady*, Legal Intelligencer, July 25, 2016.[12] Local lawyers attribute this decrease to *Daimler*. *See id.*

The City of St. Louis, notwithstanding *Daimler*, is emerging as a new jurisdiction of choice for lawsuits; this is in part due to the state's refusal to adopt the Court's gatekeeper standards for expert evidence. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, Bloomberg Businessweek, Sept. 29, 2016 (reporting that hundreds of out-of-state plaintiffs have brought claims against pharmaceutical and other companies in St. Louis, which has "developed a reputation for fast trials, favorable rulings, and big awards").[13] The Missouri Office of State Courts Administrator's statistics show that filings in St. Louis have increased from about 3,000 to more than 13,000 claimants from 2014 to 2016. *Compare* FY 2014 Profile 22nd Circuit, Missouri Courts[14] *with* FY 2016 Profile 22nd Circuit, Missouri Courts.[15] It is too soon to determine whether last week's ruling in *Dolan* will have an impact in curbing this activity, but it should.

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[12] http://www.thelegalintelligencer.com/latest-news/id=1202763506813 /OutofState-Pharma-Filings-Dip-as-Phila-Mass-Torts-Remain-Steady

[13] http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis

[14] http://www.courts.mo.gov/file.jsp?id= 83194.

[15] https://www.courts.mo.gov/file/2016%20-%20Circuit%2022.pdf.

In addition, a handful of states host most of the unfair trade practices claims against manufacturers. *See, e.g.*, Cary Silverman & James Muehlberger, The Food Court Trends in Food and Beverage Class Action Litigation 8 (U.S. Chamber Inst. for Legal Reform 2017) (finding that over 75% of consumer lawsuits targeting food makers are filed in four states). *Daimler* has proven effective in dismissing or narrowing claims where there is no connection to the state. *See, e.g., Weisblum v. Prophase Labs, Inc.*, 88 F.Supp.3d 283 (S.D.N.Y. 2015) (dismissing consumer class action fraud claims by California residents for lack of general jurisdiction over defendant while retaining such claims by New York residents).

The impact of faithfully applying *Daimler* can be seen in Delaware, which has abided by the constitutional limits set forth by this Court. Before *Daimler,* out-of-state plaintiffs with no meaningful connection to Delaware had increasingly filed asbestos claims there. *See In re Asbestos Litig.*, 929 A.2d 373, 378 (Del. 2006) (finding out-of-state asbestos claims filed in Delaware courts began in May 2005 and quickly reached 129 claims). *Daimler* reversed that trend. *See* KCIC, Asbestos Litigation, *supra*, at 5 (finding asbestos claims filed in New Castle, Delaware fell from 219 in 2014 to 124 in 2015, a decline of 43.4%). The Delaware Supreme Court has properly found that "it is not tenable" after *Daimler* to exert personal jurisdiction over a manufacturer where the claims "had nothing to do with its activities in Delaware," merely because the corporation registered to do business and appointed a registered agent to receive service of process in that state. *Genuine Parts Co v. Cepec*, 137 A.3d 123, 125-26 (Del. 2016) (finding no personal jurisdiction over manufacturer incorporated

in Georgia with principal place of business in Atlanta in asbestos claim brought by Georgia plaintiff who worked in Florida warehouse).

Amicus appreciates that this Court cannot completely eliminate forum shopping or the resulting injustices that occur in these jurisdictions. But, there are clear cases, such as the one at bar, that have no connection to the forum state or where the defendant is "at home." This type of litigation tourism must be stopped. These lawsuits violate this Court's jurisdictional safeguards, and affirmance will encourage this unconstitutional practice.

IV. EXPANDING GENERAL JURISDICTION BURDENS COURTS AND JURIES

Finally, the preference for specific jurisdiction coupled with the "at home" requirement for general jurisdiction assures that judicial resources, including jury service, are preserved for resolving issues of importance to local communities. When a court hears a case involving an out-of-state plaintiff, defendant, and injury, justice can be distorted, judicial resources burdened, and jury service undermined.

Attracting out-of-state claims is often not in concert with the interests of a local community. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 242 (2016) ("For diverse motives, such as prestige, local benefits, or re-election, some judges want to hear more of certain types of cases."). A troubling consequence of stockpiling hundreds or thousands of claims in a jurisdiction, especially when a vast majority of them have no connection to the locale, is the increased pressure to shift a court's focus from dispensing justice to disposing of cases. Some-

times well-intentioned judges take shortcuts to temporarily fix a clogged docket. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings.").

Even when a case is heard individually and on its merits, the commitment of ensuring that the nonresident business receives a fair trial can wane. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) (identifying "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (identifying "prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"). Concerns of injustice go to the heart of the fair play and substantial justice reasons this Court imposed the "at home" standard for general jurisdiction.

In addition, an expansive view of general jurisdiction will cause states to spend their limited judicial resources, including the jury service of their citizens, on cases where their communities have insufficient interests. A jury's mission is to provide a voice for its community, establish facts of a case, and ensure parties are treated neutrally and equally. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (explaining in the criminal context, juries guard against overreaching prosecutors and judges). While an overwhelming majority of Americans have high regard for the jury system, many citizens avoid jury service whenever possible. *See* Mark A. Behrens & Cary Silverman,

Improving the Jury System in Virginia: Jury Patriotism Legislation is Needed, 11 Geo. Mason L. Rev. 657 (2003). They see jury service as a solemn civic responsibility but do not want to make professional and personal sacrifices. *See, e.g., Thiel v. Southern Pac. Co.*, 328 U.S. 217, 231 (1946) (Frankfurter, J., dissenting) ("[I]t cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden.").

A citizen's personal sacrifice to serve on a jury is supposed to be counterbalanced by the ability of jurors to address an alleged wrong committed in their communities. *See* Restatement (Second) of Conflict of Laws § 36, Comment (c) (1971). To facilitate such service, some states have spent significant resources improving jury systems, creating a one-day, one-trial rule, and developing lengthy trial funds to subsidize jurors who lose incomes when at trial. When a case has no connection to the community, these resources are wasted, jurors may resent showing up for service, and the rationale for the jury pool to be a cross-section of the community is undermined.

Further, many local courts are already seeing an increase in claims and a reduction in resources. After the recent economic downturn, the deep budget cuts some systems faced "threaten[ed] the basic mission of state courts." Richard Y. Schauffler & Matthew Kleiman, *State Courts and Budget Crisis: Rethinking Court Services,* The Book of the States 2010, 290. State courts became "an easy target," for slashing budgets. Andrew Cohen, *At State Courts, Budgets Are Tight and Lives Are in Limbo*, The Atlantic, Sept. 23, 2011. The result, some feared, would be lo-

cal citizens having difficulty accessing their courts to have contract, tort, and other claims heard. *See id.*

The Court should reinforce that the "at home" requirement for general jurisdiction applies to all cases and for all U.S.-based business. Doing so protects the interest of justice and integrity of local courts.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court reverse the decision below.

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In the Supreme Court of the United States

BNSF RAILWAY CO.,

Petitioner,

v.

KELLI TYRRELL, Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF PROFESSOR STEPHEN E. SACHS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Fed. R. Civ. P. 4(k)(1)(C) 18

Advisory Committee's Notes, 28 U.S.C. app. (2012) 18

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Sup. Ct. R. 34.5 15

OTHER AUTHORITIES

Am. Law Inst., Foreign Judgments Recognition & Enforcement Act (2005) 20

Dorsey, *Some Reflections on Not Reading the Statutes*, 10 Green Bag 2d 283 (2007) 15

Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 Law & Contemp. Probs. 367 (1953) 12

Hague Conference on Private International Law, Report of the Fifth Meeting of the Working Group on the Judgments Project (Nov. 2015), https://goo.gl/zmcGTz 21

Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141 8

Keasbey, *Jurisdiction over Foreign Corporations*, 12 Harv. L. Rev. 1 (1898) 8

Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002) 24

Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. Rev. 529 (1991) 29, 30

Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. Rev. 729 (2012) 26, 28

Restatement (First) of Judgments (1942) 20

Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201 (2009) 29

Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. (forthcoming 2017), http://ssrn.com/id=2832200 ..... 5, 28, 30

J. Story, Commentaries on the Conflict of Laws (Boston, Hilliard, Gray & Co. 1834) 23

William Howard Taft, Special Message (Jan. 7, 1910), *in* 16 A Compilation of Messages and Papers of the Presidents (n.s.) 7441 (N.Y., Bureau of Nat'l Literature, Inc. n.d.) 9

4 C. Wright et al., Federal Practice and Procedure (4th ed. 2015) 8

INTEREST OF THE *AMICUS CURIAE*

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Duke University School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to this brief, and the views expressed here are solely those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

The Fourteenth Amendment to the Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Act of April 5, 1910, ch. 143, § 1, 36 Stat. 291, 291, provides in relevant part:

> "Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Other relevant provisions are set out in the appendix.

SUMMARY OF ARGUMENT

BNSF Railway Co. should win this case, but on statutory grounds alone. BNSF makes three arguments:

1) That *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), forbids Montana's exercise of general personal jurisdiction here, Pet. Br. 22–27;

2) That Congress has not sought to license the state's exercise of jurisdiction, Pet. Br. 27–48; and

3) That such a license would be void under the Fourteenth Amendment, Pet. Br. 48–54.

BNSF's first two arguments are fully persuasive and decide the case. As a result, the Court should decline to reach the third argument. Not only is it unnecessary to decide, it has the further defect of being wrong.

Respondents' case hinges on whether Congress in 1910 affirmatively licensed state personal jurisdiction over railroads doing business within state lines. Br. in Opp. (BIO) 3, 15–18; see Act of April 5, 1910 (1910 Act), ch. 143, § 1, 36 Stat. 291, 291 (codified as amended at 45 U.S.C. § 56 (2012)). It did not. The 1910 Act specified which federal courts might hear certain actions under the Second Federal Employers' Liability Act (FELA), ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 *et seq.* (2012)). It did not say which state courts might do so—only *that* state courts might do so. Later discussions of doing-business jurisdiction in fact referred to a preexisting standard for state personal jurisdiction, established well before *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Respondents' theory gets things backwards: Congress did not reshape state personal jurisdiction to fit the statutory rules for federal courts; rather, it shaped the statutory rules for federal courts to fit preexisting rules for state personal jurisdiction.

While Congress in 1910 left state personal jurisdiction as it found it, this Court's modern decisions have not. Respondents do not ask for *Daimler* to be overruled, nor do they deny that *Daimler* requires reversal in the absence of a statutory override. BIO 7–12; cf. this Court's Rule 15.2. This is enough to end the case.

That being so, the Court has no need to reach an important constitutional question. This Court has never squarely decided whether Congress may license the exercise of state personal jurisdiction that might otherwise be invalid. See BIO 17–18; Reply to Br. in Opp. 8. It should not do so in this case. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (internal quotation marks omitted); see also *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), and here there are further reasons for reticence. The United States did not participate before the Montana courts, and limiting Congress's power in this case may have the effect of striking down other federal statutes or may undermine ongoing legislative efforts and treaty negotiations. If the Court is going to restrict the power of Congress, it should wait for a case in which Congress has actually tried to use the power in question, and in which the United States has been available to defend it.

The Court may be tempted to reach the issue regardless, simply because it seems easy—so easy, in fact, as to obviate any need for caution. Congress cannot license what the Constitution forbids, and the Constitution is widely thought to forbid particular types of personal jurisdiction. Yet that widespread belief is actually mistaken. When originally enacted, the Fifth and Fourteenth Amendments did not themselves impose any fixed limits on personal jurisdiction. They required only that a court *have* jurisdiction, over the subject matter as well as the parties—with the substantive doctrines of personal jurisdiction supplied by separate bodies of general and

international law. The Fourteenth Amendment, in particular, was correctly understood by this Court in *Pennoyer* v. *Neff* to create a federal question of what had been merely a matter of general law, outside the scope of Article III appellate review. See 95 U.S. 714, 722, 732–33 (1878); see generally Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. (forthcoming 2017), http://ssrn.com/id=2832200. Modern doctrine is correct to hold that federal courts can review state judgments for their compliance with jurisdictional standards. But it is wrong to suggest that those standards are supplied by the Constitution itself, and so may not be altered by treaty or by Congress's enumerated power under Article IV.

To be clear: this brief does *not* suggest that the Court conduct its own inquiry as to the original law of due process, or even discuss the issue in any way. The necessary arguments were not briefed at the certiorari stage; they were not raised in the Montana courts; and they have been overlooked by decades of contrary decisions. Yet if the Court now finds itself in a deep hole of incorrect precedent, the least it can do is to stop digging. It should reverse and remand this judgment on statutory grounds, and it should wait for an appropriate case in which to consider the powers of Congress.

ARGUMENT

The Court Should Decline to Consider BNSF's Constitutional Argument.

A. Congress Has Not Altered the Law of State Personal Jurisdiction Here.

Congress adopted the 1910 Act in light of then-current doctrine allowing states to hear cases against corporations doing business within their borders. The 1910 Act in no way altered this doctrine, even to codify it. Instead, it simply expanded the range of *federal* districts in which railroads could be sued, so as to match the jurisdiction then available in state courts. References to doing-business jurisdiction in the cases relied on by respondents and by the Montana Supreme Court invoke this existing jurisdiction, not some new innovation dating from 1910. Congress has never revisited its decision since 1910; and whatever effect the Act may have in federal courts, it plays no role in determining the personal jurisdiction of state courts.

1. At the time Congress enacted the 1910 Act, states were recognized as having personal jurisdiction over corporations doing business therein. Under the traditional rules applied before *International Shoe*, to exercise personal jurisdiction over a nonconsenting nonresident, a state court typically had to serve process on the defendant within the state's borders. See *Pennoyer*, 95 U.S. at 727, 730–31; *D'Arcy* v. *Ketchum*, 52 U.S. (11 How.) 165, 174–76 (1851). In the strictest sense, a corporation was present—that is, had a legal existence as a juridical person—only within its state of incorporation; it might not be recognized as such within other states, which in the days before general

incorporation statutes might have had very different systems of corporate law. See *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 586–88 (1839). But a "foreign" corporation might still be permitted in other states to exercise corporate rights (to enter contracts, to appoint agents, to sue and be sued by a common name, etc.), whether by statute or by comity. *Id.* at 588–91. And this permission might be extended only on various conditions, such as a requirement to appoint local agents for service of process. See *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407 (1856).

A corporation that went ahead and did business in the state anyway, without appointing agents for service of process, would have done so with constructive knowledge of the law's requirements—with the result that the agents it actually sent to do business in the state, with power to bind the corporation in commercial matters, would be deemed to hold legal authority to accept process on its behalf. *Id.* at 407–09; see *Pennoyer*, 95 U.S. at 735–36; see also *Commercial Mut. Accident Co.* v. *Davis*, 213 U.S. 245, 253–56 (1909); *St. Clair* v. *Cox*, 106 U.S. 350, 356 (1882). Even after the dormant commerce doctrine was thought to limit states' ability to keep corporations out, the agents' authority to receive process remained in place, this time on a more general theory of corporate presence. See *Int'l Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 579, 587–89 (1914); *Tauza* v. *Susquehanna Coal Co.*, 115 N.E. 915, 917–18 (NY 1917) (Cardozo, J.).

Courts sometimes disagreed about the scope of this authority. Some held that it extended only to suits arising from business done in the state, as with modern specific jurisdiction. See *Old Wayne Mut. Life Ass'n of*

Indianapolis v. *McDonough*, 204 U.S. 8, 21–23 (1907). Others reasoned that, like authority by express appointment, the authority conferred by law might extend to any lawsuit at all, resulting in what we now call general jurisdiction. See *Tauza*, 115 N.E. at 918; cf. 4 C. Wright et al., Federal Practice and Procedure § 1066, at 357–58 & n.22 (4th ed. 2015); Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 149–53; Keasbey, *Jurisdiction over Foreign Corporations*, 12 Harv. L. Rev. 1, 5 (1898). Yet both sides took "doing business" as the crucial test.

The federal courts also recognized the "doing business" test, subject to statutory constraints. The Judiciary Act of 1789 restricted the situs of federal civil litigation in two relevant ways: no one could "be arrested in one district for trial in another," and no U.S. resident could be sued "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Ch. 20, § 11, 1 Stat. 73, 79. By the end of the nineteenth century, the "found" language had been removed, so that an "inhabitant" could be sued only in his own district—unless the case arose solely under diversity jurisdiction, in which case it could be brought in the plaintiff's home district as well. Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434; see *Macon Grocery Co.* v. *Atl. Coast Line R. Co.*, 215 U.S. 501, 505–10 (1910). Even then, "to obtain jurisdiction there must be service," and the validity of service might rest on "whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there." *Green* v. *Chi., Burlington & Quincy Ry. Co.*, 205 U.S. 530, 532 (1907).

By 1910, then, service of process (and thus state personal jurisdiction) might be properly founded on doing business. But a federal lawsuit, including one under FELA, could be brought only where the defendant was also an "inhabitant"—which, for a corporate defendant, was within its state of incorporation. *Macon Grocery*, 215 U.S. at 509–10 (quoting In re *Keasbey & Mattison Co.*, 160 U.S. 221, 229 (1895)).

2. The 1910 Act did not change the states' personal jurisdiction. Instead, it altered the *federal* statutory rule to conform it to existing state practice. In a special message to Congress that January, President Taft had called for amendments that would make the Act "as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim," deeming "process in such suit [to] be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws." William Howard Taft, Special Message (Jan. 7, 1910), *in* 16 A Compilation of Messages and Papers of the Presidents (n.s.) 7441, 7449 (N.Y., Bureau of Nat'l Literature, Inc. n.d.).

That is precisely what the Act did. The initial draft introduced in the House was worded in broader terms, permitting suit in a circuit court "in the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of commencing such action." H.R. 17263, 61st Cong. § 1 (1910); accord H.R. Rep. No. 513, 61st Cong., 2d Sess., at 2–3 (1910) (House Report). In place of this broader language, both plaintiff- and defendant-friendly witnesses in the

Senate subcommittee hearing were willing to compromise on "doing business," a phrase they thought "has had judicial determination." *Liability of Common Carriers to Employees: Hearing before the Subcomm. of the Comm. on the Judiciary, U.S. Senate, on the Bill H.R. 17263*, 61st Cong. 5 (1910) (statement of Henry Taylor, Jr.); see *id.* at 7–8 (statement of Philip J. Doherty); *id.* at 11–12 (statement of Charles J. Faulkner); see also *id.* at 9 (statement of Edward A. Moseley) ("[Plaintiffs] should be permitted to bring suit as though a United States law was not involved and have the same choice of jurisdiction which is open to parties generally."). The committee reported the bill accordingly, striking "found" and the plaintiff's residence in favor of "doing business." S. Rep. No. 432, 61st Cong., 2d Sess., at 1 (1910) (Senate Report).

As BNSF effectively argues, and as the drafting history supports, these changes had nothing to do with the bill's language on concurrent jurisdiction—which was described as a wholly separate issue, namely of correcting an errant decision by the Connecticut courts denying subject-matter jurisdiction that the states already enjoyed. Pet. Br. 34–40; see also House Report, *supra*, at 7; Senate Report, *supra*, at 5. An amendment on the Senate floor, barring removal from "any state court of competent jurisdiction," made the same assumption that state jurisdiction would be determined by other sources of law. 45 Cong. Rec. 4092–93 (1910). Even without any special deference as legislative history, and considered merely as reflecting the views of contemporary commentators, these materials reaffirm what the text of the statute indicates: that Congress left the jurisdiction of the state courts, both

over the parties and the subject matter, precisely as it found it.

3. That Congress in the 1910 Act presupposed an existing category of state jurisdiction also explains the language in subsequent cases on which respondents have relied. Shortly after the Act's enactment, the Court asked in the *Second Employers' Liability Cases* whether "rights arising under [FELA may] be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?" *Mondou* v. *N.Y., New Haven & Hartford R. Co.*, 223 U.S. 1, 46 (1912). The Court rejected an argument that FELA was originally intended to be enforced only in federal courts, relying in part on the 1910 Act's concurrent-jurisdiction language: "The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it." *Id.* at 56. FELA involved no "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure," *id.*; it merely provided a federal cause of action, "susceptible of adjudication according to the prevailing rules of procedure," *id.*, of which a state court would take cognizance "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws," *id.* at 56–57. The 1910 Act did not change the rules of state jurisdiction, but took advantage of whatever jurisdiction had already existed.

In fact, a number of the cases invoked "doing business" in the course of applying a wholly separate doctrine, a dormant-commerce version of *forum non conveniens* that treated an inconvenient forum as a

burden on interstate commerce. See *Mich. Cent. R. Co.* v. *Mix*, 278 U.S. 492, 494–96 (1929) (distinguishing this commerce argument from a Fourteenth Amendment challenge); *Davis* v. *Farmers Coop. Equity Co.*, 262 U.S. 312, 316–18 (1923) (same); Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 Law & Contemp. Probs. 367, 367, 401–06 (1953). For example, in 1932 the Court decided an appeal from a railroad seeking an end to a pending FELA case in the Missouri courts. *Denver & Rio Grande W. R. Co.* v. *Terte*, 284 U.S. 284 (1932). The Court rejected the challenge as to one corporate defendant, which had railroad lines, a business license, "an office[,] and agents in [Missouri]," and would have passed the jurisdictional test with flying colors. *Id.* at 286–87. The other defendant ran no lines in Missouri, but the Court had no need to reach its Fourteenth Amendment challenge (which had been properly raised, see *id.* at 285), resting on a conclusion that the Missouri forum imposed "a serious burden upon interstate commerce," *id.* at 287.

This dormant-commerce doctrine was relaxed somewhat by 1941, when the Court allowed an Ohio plaintiff with an Ohio injury to sue a railroad doing business in the Eastern District of New York. *Balt. & Ohio R. Co.* v. *Kepner*, 314 U.S. 44, 48–49 (1941). The railroad had asked the Ohio courts to enjoin the federal suit. *Id.* Those courts, like this Court, treated the 1910 Act "as decisive of the issue": the Act created a "federal privilege" to sue in various *federal* courts, with which neither the rules of equity nor any "state statute, rule or policy" would interfere. *Id.* at 52–53. And because the railroad was indeed "doing business in New York," as Congress had demanded, the Court saw no need to

ask if the suit "creates an inadmissible burden upon interstate commerce." *Id.* at 51.

This reasoning was soon extended to suits in state court that had obtained personal jurisdiction in the ordinary way. When a Tennessee plaintiff brought suit for a Tennessee injury against an Illinois railroad in the Missouri courts, the Tennessee courts enjoined the suit, but this Court reversed. *Miles* v. *Ill. Cent. R. Co.*, 315 U.S. 698, 699–701 (1942). The Court started by denying any "burden on interstate commerce" when the railroad did extensive business in Missouri. *Id.* at 701. Given that the 1910 Act not only reaffirmed concurrent jurisdiction but even barred removal of FELA cases to federal courts, Congress had "exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden [on commerce], *where process may be obtained on a defendant*, not merely soliciting business but *actually carrying on railroading* by operating trains." *Id.* at 702 (emphasis added). In other words, Congress had anticipated state suits wherever "process may be obtained on a defendant" in the ordinary course—which at the time happened to include, under the doing-business rule, the states in which the corporation was "actually carrying on railroading."

The "real point of controversy" in *Miles* was not the commerce question, but whether the Court could reject the railroad's alternative ground, namely that the choice of forum was inequitable as a matter of state law. *Id.* As the Court recognized, FELA did not say which state courts could hear its cases: it "recogniz[ed] the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent," but left

"[t]he venue of state court suits * * * to the practice of the forum." *Id.* at 703. Yet FELA was still "binding on every citizen and every court and enforceable *wherever jurisdiction is adequate for the purpose*." *Id.* at 704 (emphasis added). Because federal law created the cause of action and conferred the right to sue, a state could not prevent its citizens from "exercis[ing] the federal privilege of litigating a federal right in the court of another state": "the right to sue in state courts of proper venue *where their jurisdiction is adequate* is of the same quality as the right to sue in federal courts," which no state could take away. *Id.* (emphasis added). In repeatedly stating that jurisdiction must be adequate, the Court treated this caveat as stemming from a separate source of law: that, and not FELA's concurrent-jurisdiction language, was why "[t]he permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business." *Id.* at 705. In this respect, at least, the dissent read the statute the same way: "The essence of [the 1910 Act] is merely that the state courts are open to a plaintiff suing under [FELA]," and it "affords no intimation that Congress intended anything more." *Id.* at 710 (Frankfurter, J., dissenting).

Miles rested on a simple logic: Congress had explicitly licensed suit in federal districts where the defendant was doing business; and "[i]f suits in federal district courts at those points do not unduly burden interstate commerce, suits in similarly located state courts cannot be burdensome." *Id.* at 705 (opinion of the Court). This reasoning, and not a claim that the 1910 Act silently expanded state personal jurisdiction, explains the Court's statement a few years later that FELA "establishes petitioner's right to sue in Alabama."

Pope v. *Atl. Coast Line R. Co.*, 345 U.S. 379, 383 (1953). The Court noted that "the *Miles* case dealt with precisely the issue before us," and it followed the same reasoning: if "Congress has deliberately chosen to give petitioner a transitory cause of action," letting the employee "bring his suit wherever the carrier 'shall be doing business,'" and if "admittedly respondent does business in Jefferson County, Alabama," then a state court could not "'enjoin its citizens, *on the ground of oppressiveness* . . . from suing . . . in the state courts of another state . . . .'" *Id.* (omissions in original) (quoting *Miles*, 315 U.S. at 699).

4. If Congress did not alter state personal jurisdiction in the 1910 Act, it has never done so since. The Judicial Code of 1911 did not change the 1910 Act's language, but merely required its reference to circuit courts to "be deemed and held to refer to * * * the district courts." Act of March 3, 1911, ch. 231, § 291, 36 Stat. 1087, 1167.[2] An amendment in 1939 extended FELA's statute of limitations but made no other changes. Act of Aug. 11, 1939, Ch. 685, § 2, 53 Stat. 1404, 1404. And the 1948 recodification of Title 28 separated the bar on removal from the concurrent-

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[2] While the parties have focused on section 56 of Title 45, U.S. Code (per this Court's Rule 34.5), the individual acts of Congress, and not their compilation in Title 45, represent the operative law. Neither the alteration of the word "circuit" to "district" in § 56, nor the alteration of "Act" to "chapter," was ever actually enacted by Congress; nor has Title 45 itself been enacted as positive law. Cf. *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993); Dorsey, *Some Reflections on Not Reading the Statutes*, 10 Green Bag 2d 283, 284 (2007) ("The result is something like a Cliffs Notes guide to the real law. That is all the Code is, and that is all it is supposed to be.").

jurisdiction language, see Act of June 25, 1948, ch. 646, §§ 1, 18, 62 Stat. 869, 939, 989 (codified in part at 28 U.S.C. § 1445(a) (2012)); but such recodifications do not alter the statute's effect "unless such intention is clearly expressed." *United States* v. *Welden*, 377 U.S. 95, 98–99 n.4 (1964) (internal quotation marks omitted). The Act's effect on state jurisdiction is the same as it was in 1910.

5. Though the 1910 Act may have taken state personal jurisdiction as it found it, that is not how this Court takes the doctrine today. *Miles* and *Pope* may at most be read to show the Court's implicit reliance on the broad view of doing-business jurisdiction: serving process on an agent operating railroads in one state was taken to support jurisdiction over an employee injury that took place in another. This was apparently consistent with *International Shoe*, which treated mere solicitation of business as enough for specific jurisdiction, see 326 U.S. at 314–16, 320, and which suggested that more substantial "continuous corporate operations" might support suits on "dealings entirely distinct from those activities," *id.* at 318 (citing *Tauza*). But it is not consistent with *Daimler*, which rejected the broad approach to doing-business jurisdiction and found the "substantial, continuous, and systematic course of business" test to be "unacceptably grasping." 134 S. Ct. at 761 (internal quotation marks omitted); see also *id.* at 762 n.20.

Respondents do not ask for *Daimler* to be overruled, nor do they seek to limit *Daimler* to transnational cases. BIO 8–10. That is enough to justify reversal. The Court's modern approach to general jurisdiction forbids

Montana's exercise of jurisdiction here, and Congress has never suggested otherwise.

In reaching that conclusion, however, this Court need not decide on the scope of *federal* personal jurisdiction. Cf. BIO 18–20. While the 1910 Act has often been described as a "venue" provision, see, *e.g.*, *Kepner*, 314 U.S. at 49, courts at the turn of the century did not always distinguish "jurisdiction" from other limits as neatly as we do today, see *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90–91 (1998), and the Act's effect on federal personal jurisdiction is unclear. For example, while the 1910 Act was pending in Congress, the Court cited the "inhabitant" limitation to which the Act responded as supporting to a "plea to the jurisdiction"—and as the limitation had not been waived, it found that the circuit court "was without jurisdiction of the persons of the defendants." *Macon Grocery*, 215 U.S. at 503, 508; see also *id.* at 510; *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444, 449 (1892) (stating that the "inhabitant" limitation "restricts the jurisdiction"). This raises the question whether the 1910 Act sounded in what we call personal jurisdiction, and not merely venue; the historical inconsistency in usage cuts both ways.

BNSF correctly notes that Congress did not phrase the 1910 Act in terms of service of process, like other personal-jurisdiction statutes. Pet. Br. 31–33. But that is because it did not need to. If a railroad did business within a district in 1910, the agent it had sent to do that business could be validly served within the district, and the 1910 Act provided that the action "may be brought" in the relevant federal circuit court. There

would have been no point in providing that the circuit court's process could also be served somewhere else.

Since 1910, Congress and the Court have gradually severed the connection between jurisdiction and service—allowing process to be served around the globe, while treating service as establishing jurisdiction only in certain cases, such as when it is available "in the state where the district court is located" or "when authorized by a federal statute." Compare Fed. R. Civ. P. 4(e), (f), (h), with *id.* 4(k)(1)(A), (C); see also *id.* 4(f) (1938), 308 U.S. 667 (allowing process to run throughout "the state in which the district court is held," or outside the state by federal statute); *id.* 4(e)–(f), (i) (1963), 374 U.S. 876–78 (allowing out-of-state service via state-law procedures); *id.* 4(k) (1993), 507 U.S. 1109 (establishing the Rule in essentially its current form); Advisory Committee's Notes, 28 U.S.C. app. at 93–94, 94–95, 104–06 (2012).

What effect these changes have had on the 1910 Act is a murky issue this Court can well avoid. If the Act spoke only to venue, then personal jurisdiction in federal FELA cases might have to be established under Rule 4(k)(1)(A), and the range of judicial districts in which a FELA case may *actually* be brought has shrunk along with the reach of state personal jurisdiction. On the other hand, if "may be brought" means that federal personal jurisdiction has been "authorized by a federal statute"—as courts in 1910 might well have understood the Act to do—then this suit could have been brought in the U.S. District Court for the District of Montana under Rule 4(k)(1)(C). That question is not presented on these facts, and this Court need not decide it. Whether or not the Act authorizes personal jurisdiction

in federal courts, it certainly does not do so in state courts, which means that respondents lose.

B. Congress Not Having Acted, the Court Should Not Address Its Power to Act.

Because BNSF is right about the statute, and because reversing on statutory grounds would afford BNSF complete relief, this Court need not decide who is right about congressional power. Not only is it the Court's standard practice to avoid unnecessary questions, but this practice has special force when a statutory inquiry might foreclose a constitutional one. See *Bond*, 134 S. Ct. at 2087; *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

As noted above, the judgment under review was rendered without the benefit of participation by the United States. That may not be uncommon for state-court litigation; but this Court's role as one "of final review and not first view" counsels postponing the question if possible. *Dep't of Transp.* v. *Ass'n of Am. Rs.*, 135 S. Ct. 1225, 1234 (2015) (internal quotation marks omitted). Moreover, to the extent that BNSF draws into question the constitutionality of an Act of Congress, its petition did not recite the potential applicability of 28 U.S.C. § 2403(a). See this Court's Rules 14.1(e)(v), 29.4(b).

The case for a narrow decision is even stronger when the constitutional question is significant. Statutes not discussed by the parties may turn out to be invalid if BNSF's position is correct. For example, the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (2012), prevents interstate conflict in child custody cases by assigning exclusive jurisdiction to a

single state—which may not always be the same state that this Court's state-court due process jurisprudence might otherwise choose. If a third party asserts paternity rights as against a husband and wife, as in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), that third party may be a "contestant" statutorily entitled to sue in his home state, even after the couple and child have moved away and are no longer domiciled there. See § 1738A(b)(2), (4), (c)(2)(A), (d). Whether to uphold Congress's selection in such instances is surely not on the table here.

The same goes for legislative or treaty proposals involving the recognition of foreign judgments. This Court has never squarely held whether it violates due process, in its own right, to enforce according to federal statutes or treaties the judgments of foreign courts that fail to meet American jurisdictional standards. See Restatement (First) of Judgments § 13 & cmt.*c* (1942) (suggesting that it does); cf. *Richards* v. *Jefferson County*, 517 U.S. 793, 797 n.4 (1996) (insisting on the judgment of a "court of competent jurisdiction" (internal quotation marks omitted), and citing *Scott* v. *McNeal*, 154 U.S. 34, 46 (1894)); accord *Underwriters Nat'l Assur. Co.* v. *N.C. Life & Accident & Health Ins. Guar. Co.*, 455 U.S. 691, 704–05 n.10 (1982) (discussing sister-state judgments). At the same time, the American Law Institute has produced a model statute on judgment recognition which may require some of these judgments to be enforced—for example, a judgment from the United Kingdom binding a contactless codefendant in France. Am. Law Inst., Foreign Judgments Recognition & Enforcement Act § 6(a)(v) & cmt. *c*, reporter's note 3 (2005). Likewise, draft text for an international convention on judgments

would enforce certain contractual judgments "unless the defendant's activities in relation to the transaction *clearly* did not constitute a purposeful and substantial connection to that State"—which may succeed in reproducing the requirements of American due process doctrine, but which also might not. Hague Conference on Private International Law, Report of the Fifth Meeting of the Working Group on the Judgments Project, annex art. 5(1)(e), at iii (Nov. 2015), https://goo.gl/zmcGTz (emphasis added).

It is plainly an important question whether U.S. legislators or treaty negotiators have latitude to depart from current doctrine when compromising on a uniform jurisdictional standard for the nation or the globe. The Court should not decide such questions prematurely, in a case that has nothing to do with them. To decide this case, there is no need to speculate on congressional powers that Congress has not attempted to exercise here.

C. Congress Would Have Power to Recognize the Expanded Exercise of State Personal Jurisdiction.

A further reason not to adopt BNSF's view of congressional power is that it is wrong. BNSF argues that Congress cannot license what the Fourteenth Amendment's Due Process Clause forbids. Pet. Br. 48–54. But notwithstanding contrary language in various decisions of this Court, the Due Process Clause does not itself set out the grounds on which state courts may exercise jurisdiction. The Fourteenth Amendment requires only that state courts *have* jurisdiction, obtained from some appropriate source of law; it does not specify what those sources could be.

The limits applied by *Pennoyer* and its progeny were in fact imposed by rules of general and international law, which American courts had applied since the Founding (and before). Subsequent case law mistakenly attributed these limits to the Constitution itself, suggesting that they are beyond the power of Congress to alter or amend. But as the Supremacy Clause provides, such rules are subject to abrogation, whether by treaty or by statute pursuant to Congress's enumerated powers. U.S. Const. art. VI, cl. 2.

Because Congress indeed has such enumerated power under Article IV, it might have exercised that power here. Because it did not in fact do so, however, the Court need not, and should not, address the issue.

1. The Constitution of 1788 imposed no limits on personal jurisdiction, state or federal. Nor was the Fifth Amendment's Due Process Clause, ratified in 1791, seen to impose any territorial restrictions on personal jurisdiction. A federal court's process might ordinarily run within its district, but Congress might choose to send it "into every state in the Union"; and if Congress ordered that "a subject of England, or France, or Russia, * * * be summoned from the other end of the globe to obey our process," a court "would certainly be bound to follow it, and proceed upon the law." *Picquet* v. *Swan*, 19 F. Cas. 609, 611, 613, 615 (CCD Mass 1828) (No. 11,134) (Story, Circuit Justice); accord *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (attributing "great force" to *Picquet*'s reasoning). Similar due process clauses in state constitutions were not taken as limiting the state's personal jurisdiction for many decades after the Founding, until the time of

the Civil War. See, *e.g.*, *Beard* v. *Beard*, 21 Ind. 321, 324 (1863).

Yet the absence of *constitutional* limits on personal jurisdiction did not mean there were *no* limits. Instead, these limits were supplied by doctrines of general and international law, which addressed the sovereign authority of separate states. A foreign court exercising an exorbitant jurisdiction, issuing judgments against nonresidents or property outside its own borders, would find those judgments ignored by other nations' courts when presented for recognition or enforcement; no court could "exercise[] a jurisdiction which, according to the law of nations, its sovereign could not confer." *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 276 (1808) (Marshall, C.J.); accord *Buchanan* v. *Rucker*, 9 East. 192, 103 Eng. Rep. 546 (K.B. 1808). Such a judgment, rendered without jurisdiction, was traditionally viewed as *coram non judice* and void, see *The Marshalsea*, 10 Co. Rep. 68b, 76a–b, 77 Eng. Rep. 1027, 1038–39 (K.B. 1613); it was a mere "nullity," *Kempe's Lessee* v. *Kennedy*, 9 U.S. (5 Cranch) 173, 184 (1809) (Marshall, C.J.) (summarizing argument of counsel), or a piece of "waste paper," *Voorhees* v. *Jackson*, 35 U.S. (10 Pet.) 449, 475 (1836), of no legal force or effect. See generally J. Story, Commentaries on the Conflict of Laws § 586, at 492 (Boston, Hilliard, Gray & Co. 1834).

The same was true of the judgments of sister states. A state statute announcing an exorbitant jurisdiction might be given effect in the state's own courts, in preference to general or international rules; but the judgment would be recognized in other courts only if *those* courts saw the defendant as lawfully

"*commanded* * * * to appear and answer." *Hart* v. *Granger*, 1 Conn. 154, 168–69 (1814); see also *Bartlet* v. *Knight*, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.); *Kilburn* v. *Woodworth*, 5 Johns. 37, 41 (NY 1809) (per curiam); Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1573–74 (2002).

Whether that command was lawful would be assessed under the same international rules of jurisdiction that state courts had applied under the Articles of Confederation. See, *e.g.*, *Jenkins* v. *Putnam*, 1 S.C.L. (1 Bay) 8, 9–10 (SC Ct. Com. Pl. & Gen. Sess. 1784); accord *Kibbe* v. *Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786); *Phelps* v. *Holker*, 1 U.S. (1 Dall.) 261, 264 (Pa 1788) (opinion of McKean, C.J.). These international rules remained in place under the Constitution's Full Faith and Credit Clause, U.S. Const. art. IV, § 1, and its implementing statute, Act of May 26, 1790, ch. 11, 1 Stat. 122. State judges sometimes disagreed on the meaning of the Clause and the statute, but they agreed that neither required recognition for invalid judgments that failed to respect prevailing rules on judicial authority. Compare, *e.g.*, *Rogers* v. *Coleman*, 3 Ky. (1 Hard.) 413, 424–25 (1808), with *Bissell* v. *Briggs*, 9 Mass. 462, 469 (1813) (opinion of Parsons, C.J.).

Federal courts took the same view. See, *e.g.*, *M'Elmoyle* ex rel. *Bailey* v. *Cohen*, 38 U.S. (13 Pet.) 312, 326–27 (1839); *Elliott* v. *Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340–41 (1828); *Banks* v. *Greenleaf*, 2 F. Cas. 756, 759 (CCD Va 1799) (No. 959) (Washington, Circuit Justice). State statutes purporting to expand jurisdiction might well be "rules of decision * * * in

cases where they apply," overriding contrary rules of general law. Judiciary Act of 1789 § 34, 1 Stat. at 92 (codified as amended at 28 U.S.C. § 1652 (2012)). But in the era before *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the federal courts were free to consult general conflicts principles before determining which states' statutes actually applied. They could therefore disregard, as exceeding the state's legislative competence, statutes attempting to project jurisdiction beyond the state's own borders. See, *e.g.*, *Flower* v. *Parker*, 9 F. Cas. 323, 324–25 (CCD Mass 1823) (No. 4891) (Story, Circuit Justice). Accordingly, this Court held in 1851 that there was no obligation, either in a state or a federal court, to recognize or enforce a state-court judgment that violated the "well-established rules of international law, regulating governments foreign to each other," as to the extent of state personal jurisdiction. *D'Arcy*, 52 U.S. at 174.

2. The Fourteenth Amendment altered this picture, not by silently imposing new rules of personal jurisdiction, but by creating a new avenue for appellate review. The principles of conflict of laws and the international law of jurisdiction were not federal law, but general law, on which state and federal courts could disagree. See, *e.g.*, *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). And before the Fourteenth Amendment, an exorbitant judgment in a state's own courts could not always be appealed to this Court, because issues of general law did not support arising-under jurisdiction under Article III. See *N.Y. Life Ins. Co.* v. *Hendren*, 92 U.S. 286, 286–87 (1876). As *Pennoyer* recognized, "there was no mode of directly reviewing such judgment or impeaching its validity within the State

where rendered; and * * * it could be called in question only when its enforcement was elsewhere attempted." 95 U.S. at 732.

This is what the Fourteenth Amendment changed. With the Amendment in place, *Pennoyer* explained, "the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties *over whom that court has no jurisdiction* do not constitute due process of law." *Id.* at 733 (emphasis added). In other words, a judgment rendered without jurisdiction was still a "nullity" or a piece of "waste paper"; and depriving someone of liberty or property, based only on a piece of "waste paper," was a deprivation without due process of law. That is why, for example, *Pennoyer* put the same weight on the state court's jurisdiction over "the subject-matter of the suit" as over the parties. *Id.* The Fourteenth Amendment's Due Process Clause surely does not specify, say, which state courts have subject-matter jurisdiction over small-claims cases. Rather than setting out detailed rules for jurisdiction, it requires only that the state court *have* some, as determined by other sources of law. See Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. Rev. 729, 732 (2012). Without other rules to apply, *Pennoyer*, like *D'Arcy*, drew on general principles of international law (which it called "principles of public law") to determine that the state judgment at issue was void. 95 U.S. at 722; see also *id.* at 730 (quoting *D'Arcy* on international law).

In recognizing judgments without jurisdiction as posing due process concerns, *Pennoyer* did not require federal review of every garden-variety claim that a state court might lack jurisdiction. Ordinarily the subject-matter jurisdiction of state courts is a matter solely of state law—on which federal courts defer to state ones, absent evidence of malfeasance. *Broad River Power Co.* v. *South Carolina* ex rel. *Daniel*, 281 U.S. 537, 540 (1930), *aff'd*, 282 U.S. 187 (1930) (per curiam); *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825). But when a state asserts subject-matter jurisdiction outside its legislative competence, as understood by the federal courts, its judgments may indeed be reviewed and set aside. See, *e.g.*, *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222 (1998); *Fall* v. *Eastin*, 215 U.S. 1 (1909). And the same is true when a state purports to exercise a jurisdiction that traditional rules of personal jurisdiction forbid. No state is thought competent, from the perspective of a federal court, simply to declare its own jurisdiction over nonresidents or property outside its own borders. And to the extent that state and federal courts disagree on the general rules of jurisdiction, the availability of federal appellate review means that the federal view of these rules will control. That is precisely how some contemporary state courts understood *Pennoyer*: the limits on their jurisdiction were imposed, not by the Due Process Clause, but by the fact that the Clause had enabled routine review of a general-law issue in federal court. See, *e.g.*, *Belcher* v. *Chambers*, 53 Cal. 635, 643 (1879); accord *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U.S. 602, 609 (1899) (describing the relevant federal question as "whether the [state] court obtained jurisdiction to render judgment in the case against the [defendant] so that to enforce it would not be taking the

property of the [defendant] without due process of law"). See generally Sachs, Pennoyer *Was Right*, *supra* (manuscript at 61–63, 68–78).

It is not hard to understand how this jury-rigged doctrine—that jurisdiction is ordinarily a matter of general law, the federal courts' view of which will control in light of the availability of appellate review under the Due Process Clause—would be simplified over time. The Court soon began speaking in shorthand, asking merely whether the state law or state judgment "contravenes the due process clause." *Hess* v. *Pawloski*, 274 U.S. 352, 355 (1927); see Perdue, *supra*, at 733. But it was error for the courts to treat this shorthand as if it were substance—particularly on issues, such as congressional power, where the distinction makes a difference. The modern doctrine that the Due Process Clause directly establishes territorial limits unalterable by Congress, as suggested by *International Shoe* and its progeny, is the product of confusion and mistake rather than of the Fourteenth Amendment.

3. The original law of personal jurisdiction and due process has clear implications for the powers of Congress. The substantive limits on state personal jurisdiction stem from general and international law, and not from the Constitution; they are merely "part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and not "supreme Law of the Land," U.S. Const. art. VI, cl. 2. As such, they may be abrogated by a properly adopted treaty, or by a statute made pursuant to Congress's enumerated powers. See *id.*

As it turns out, Congress does have such enumerated power. In addition to requiring "Full Faith

and Credit" to the "public Acts, Records, and judicial Proceedings" of each state, Article IV empowers Congress "by general Laws" to "prescribe * * * the Effect" that "such Acts, Records and Proceedings" shall have. U.S. Const. art. IV, § 1. This allows Congress to adopt a national compromise regarding the territorial scope of each state's judicial power. Early Congresses repeatedly proposed such compromises, including by recognizing and giving some effect to judgments that might otherwise have lacked personal jurisdiction according to general law; the main objections to those proposals were made on substantive rather than constitutional grounds. See, *e.g.*, H.R. 46, 9th Cong., 1st Sess., § 1 (1806); H.R. 45, 13th Cong., 2d Sess., § 3 (1814); H.R. 17, 15th Cong., 1st Sess., § 1 (1817); see also Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1251–78 (2009); *id.* at 1264–65 n.278.

Were Congress to prescribe the effect of some category of state judgments, that statute could override any general rules of personal jurisdiction that might otherwise bar a judgment's recognition in state or federal court, including on direct review in this Court. Congress did not enact such an override in 1790, see *D'Arcy*, 52 U.S. at 176, but that does not mean it can no longer do so today. If it did, then both state and federal courts would "proceed upon the law," *Picquet*, 19 F. Cas. at 615, in accepting the state judgment as valid and in giving it full effect "in every court within the United States." 28 U.S.C. § 1738 (2012). The judgment being valid according to law, there would be no argument that the deprivation of liberty or property it ordered had been done "without due process of law." Cf. Perdue, *Personal Jurisdiction and the Beetle in the Box*,

32 B.C. L. Rev. 529, 564–67 (1991); Sachs, Pennoyer *Was Right*, *supra* (manuscript at 38–40, 42–48, 53–55, 72–74, 78–79, 86–88).

4. The fact that Congress has such power does not mean that the 1910 Act used it. As a result, this brief does *not* suggest that the Court, in the course of deciding this case, undertake a frolic and detour into the original law of personal jurisdiction and due process. The necessary historical arguments have not been briefed by the parties, whether at the certiorari stage or before the Montana courts. And they require the reexamination of decades of previous decisions, which—however erroneous they may be—neither party has yet seen fit to challenge.

Instead, the importance of the history in this case is merely to counsel caution. No matter how easy the constitutional issue may appear, under these circumstances the Court should not act without full consideration—especially in ways that might foreclose future efforts by the United States, by statute or treaty, to recognize the expanded exercise of jurisdiction by state courts. Should the United States choose to make such efforts, there will be plenty of time to consider the historical questions then, under the appropriate standards of *stare decisis* (including whether the prior cases were "badly reasoned," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). In the meantime, the Court should avoid carrying potentially erroneous decisions into new fields, and it should resolve this case on statutory grounds alone.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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March 6, 2017

APPENDIX

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Act of April 22, 1908

Second Federal Employer's Liability Act, ch. 149, § 6, 35 Stat. 65, 66:

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Act of April 5, 1910

Ch. 143, § 1, 36 Stat. 291, 291:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Act of March 3, 1911

Judicial Code of 1911, ch. 231, § 291, 36 Stat. 1087, 1167:

SEC. 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.

Act of Aug. 11, 1939

Ch. 685, § 2, 53 Stat. 1404, 1404:

SEC. 2. That the first sentence of section 6, of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908 (35 Stat. 65; U.S.C., title 45, sec. 56), be, and it is hereby, amended to read as follows:

"SEC. 6. That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued."

Act of June 25, 1948

Revision of the Judicial Code, ch. 646, §§ 1, 18, 62 Stat. 869, 939, 989:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, entitled "Judicial Code and Judiciary" is hereby revised, codified, and enacted into law, and may be cited as "Title 28, United States Code, section —", as follows:

* * *

§ 1445. Carriers; non-removable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51–60 of Title 45, may not be removed to any district court of the United States.

* * *

SEC. 18. The second sentence of the second paragraph of the Act approved April 22, 1908 (chapter 149, 35 Stat. 65, 66; 45 U.S.C., section 56) as added by the Act approved April 5, 1910 (chapter 143, section 1, 36 Stat. 291), is amended to read as follows:

"The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States."

RECORD AND BRIEFS

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No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state court may decline to follow this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not "at home" in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in federal and state courts in cases implicating due-process limitations on a court's authority to exercise personal jurisdiction over an out-of-state defendant. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Figueroa v. BNSF Ry. Co.*, 361 Or. 142 (2017); *Bristol-Myers Squibb Co. v. Superior Court of California*, No. 16-466 (U.S. Sup. Ct., dec. pending).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles concerning due-process constraints on the judiciary's exercise of personal jurisdiction. *See, e.g.,* Mark Moller, *Contra Plaintiffs' Bar, Registering to Do Business Does Not Create General Jurisdiction*, WLF Legal Opinion Letter (June 10, 2016); Eric L. Alexander, *Plaintiffs Cannot Skirt* Daimler AG v. Bauman *with "Pendent Jurisdiction" Theory*, WLF Legal Opinion Letter (Apr. 1, 2016); James M. Beck,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief, and blanket letters of consent have been lodged with the Clerk.

Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after Daimler AG v. Bauman, WLF Working Paper (Nov. 2015).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

This Court's landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), made clear that state and federal courts lack personal jurisdiction over a corporate defendant unless (1) that defendant's activities within the forum state give rise to the claims being asserted or (2) the corporation is "at home" in the forum state. In sharply curtailing its prior "continuous, substantial, and systematic" rationale for general personal jurisdiction, *Daimler* clarified that a corporation, even one that conducts significant business in all 50 states, can be deemed "at home" in no more than one or two states: its state of incorporation and its principal place of business (or its surrogate principal place of business).

Amici favor strict adherence to *Daimler*'s due-process limitations on the judiciary's exercise of personal jurisdiction over out-of-state defendants. *Amici* are concerned that the statutory rationale for personal jurisdiction adopted by the Montana Supreme Court—if not rejected by this Court—will erode the due-process rights of defendants and render *Daimler* a dead letter in all cases brought

under the Federal Employers' Liability Act. *Amici* thus urge the Court to clarify that the Due Process Clause of the Fourteenth Amendment unequivocally bars state courts from exercising general jurisdiction over nonresident defendants in such cases. Such clarity is needed to provide companies that have a multi-state presence some minimal assurance as to where their conduct will render them liable to suit.

STATEMENT OF THE CASE

BNSF Railway Company (BNSF) is a leading freight railway carrier in the United States. Incorporated in Delaware, BNSF's principal place of business is Ft. Worth, Texas. *See* Pet. App. 3a. Although BNSF operates in 28 states, including Montana, *none* of BNSF's corporate offices or departments is located in Montana. *Id.* at 63a.

Respondents Kelli Tyrrell and Robert Nelson—neither of whom are residents of Montana—brought separate suits against BNSF in Montana state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, alleging that BNSF's negligence caused them to sustain injuries while working for BNSF. Pet. App. 1a-4a. Respondents do not allege that they ever lived or worked in Montana; nor do they allege that they suffered any injury in Montana. *Ibid.*

Given respondents' bare jurisdictional allegations, BNSF moved to dismiss each suit on the basis that Montana state courts cannot exercise general jurisdiction over it consistent with the due-process constraints this Court recognized in *Daimler*. The trial court in *Tyrrell* denied BNSF's motion and

certified its ruling as final, allowing BNSF to seek discretionary appeal. Pet. App. 41a-46a, 47a-73a. In *Nelson*, the trial court granted BNSF's motion to dismiss, and the plaintiff appealed from that ruling as of right. *Id.* at 36a-40a. The Montana Supreme Court accepted BNSF's appeal in *Tyrrell*, which it then consolidated with *Nelson*. *Id.* at 34a-35a.

A divided Montana Supreme Court "decline[d]" to apply *Daimler*, which it dismissively viewed as "factually and legally distinguishable." Pet. App. 15a. Because *Daimler* was "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States," the court deemed it inapplicable here, where "all the parties involved are citizens of the United States." Pet. App. 11a. Most significantly for the court, *Daimler* "did not involve a railroad claim or a railroad defendant." *Ibid.*

Invoking FELA's venue provision, 45 U.S.C. § 56—which establishes venue for FELA cases filed "in a district court of the United States" and provides state courts with "concurrent jurisdiction" over such claims—the Montana Supreme Court cited cases purportedly showing that *this* Court "consistently has interpreted [§] 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a, 12a-13a. Because *Daimler* "did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business,'" *id.* at 12a, the court concluded that the Montana courts' exercise of

personal jurisdiction fully "comports with the due process clause." *Id.* at 17a-18a.

Justice McKinnon dissented at length. Pet. App. 20a-30a. Criticizing the majority for improperly circumventing this Court's holding in *Daimler*, she pointed out that this Court's FELA precedents relied on by the majority "do not so much as mention the Due Process Clause or general jurisdiction." *Id.* at 27a. She went on to explain that § 56 of FELA "is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts." *Id.* at 29a. Regardless of FELA, Justice McKinnon concluded that "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." *Id.* at 31a.

SUMMARY OF ARGUMENT

Among the bedrock freedoms protected by the Due Process Clause is the freedom not to be haled into court indiscriminately. This case arises from injuries respondents allegedly sustained outside of Montana while working for BNSF—a railway company incorporated in Delaware and headquartered in Texas. None of the events giving rise to respondents' claims occurred in Montana, and no party in this case is a citizen or resident of Montana. Nonetheless, the Montana Supreme Court held that BNSF can be sued in Montana by nonresident plaintiffs for claims that have no connection whatsoever to Montana.

The Montana Supreme Court's holding in this case simply cannot be squared with the due-process

limitations on personal jurisdiction this Court recognized in *Daimler AG v. Bauman*. Consistent with those limits, Montana courts may exercise general jurisdiction over BNSF only if the defendant's contacts with Montana are so extensive as to render it "at home" there. In this case, BNSF is clearly not at home in Montana, and because the plaintiffs' claims have no connection whatsoever to Montana, no other basis for personal jurisdiction exists. Under nearly identical facts, both the Oregon and Missouri Supreme Courts recently held that due process simply does not allow state courts to exercise general jurisdiction over nonresident defendant railway companies. *See Barrett v. Union Pac. R.R. Co.*, 361 Or. 115, 117 (2017); *State ex rel. Norfolk Southern Ry. Co. v. Dolan*, No. SC95514, slip op. at 8 (Mo. Feb. 28, 2017).

FELA makes no difference. Under the Supremacy Clause, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse Montana courts from their duty to accord due process of law to every defendant haled before them. Contrary to the Montana Supreme Court, FELA's venue provision, 45 U.S.C. § 56, offers no independent basis for personal jurisdiction over BNSF. Because personal jurisdiction and proper venue are wholly distinct requirements, federal statutes such as FELA, which merely delineate a number of potential venues, assume *nothing* about the existence of personal jurisdiction in any given case. While FELA provides for concurrent subject-matter jurisdiction of *claims* for state and federal courts, it neither alters nor expands the authority of state courts to exercise personal jurisdiction over *persons*.

Nor *could* FELA expand the personal jurisdiction of the state courts, as Justice McKinnon properly noted in her dissent. Whatever the extent of Congress's authority to expand the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the jurisdictional reach of *state* courts. This Court has made clear that the Constitution imposes unique *territorial* constraints on the exercise of personal jurisdiction by state courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. As a result, FELA cannot abrogate the sovereignty of the states, nor may Congress alter the Constitution's deliberate framework of horizontal federalism.

Unless reversed, the Montana Supreme Court's erroneous holding will enable FELA plaintiffs, like those here, to shop their claims to forums with no connection to those claims. Such forum shopping distorts the civil justice system by creating inefficiencies when cases are litigated far from the location of the parties, the alleged tortious conduct, and the evidence—all while subjecting defendants to the cost and inconvenience of having to litigate in a distant location. By permitting plaintiffs whose suits have no relationship to Montana to subject a nonresident defendant to suit there, the decision below rewards improper forum shopping and invites further abuse.

ARGUMENT

I. FELA Does Not Supplant Bedrock Due-Process Limitations on State Courts' Exercise of Personal Jurisdiction

The decision below interprets federal law as permitting nonresident defendants to be haled into state court to answer FELA claims that have no connection whatsoever to the forum state. But the Due Process Clause bars the exercise of jurisdiction over nonconsenting, out-of-state defendants unless the suit is brought to enforce "obligations [that] arise out of or are connected with the [defendant's] activities within the state." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *see J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality op.) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").

This Court has consistently held that a state court may not exercise personal jurisdiction over an out-of-state defendant simply because that defendant has engaged in "continuous" or "systematic" activities within the state. Rather, due process requires a showing that the defendant's in-state activities are sufficiently connected to the lawsuit. *See, e.g., Daimler*, 134 S. Ct at 757 ("[A] corporation's 'continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'") (quoting *Int'l Shoe*, 326 U.S. at 318); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (explaining that "the central concern of the inquiry

into personal jurisdiction" is "the relationship among the defendant, the forum, and *the litigation*") (emphasis added).

A defendant is generally required to answer any and all claims asserted in its "home" jurisdiction, even if the claim bears no relationship to the defendant's contacts in that jurisdiction. *Daimler* made plain, however, that exercising such "general jurisdiction" over a corporation can be sustained in only two places: the state in which a corporation maintains its principal place of business and the state of incorporation. 134 S. Ct. at 760. As *Daimler* clarified, personal jurisdiction may not be exercised over nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in" the forum state. *Daimler*, 134 S. Ct. at 762. Indeed, this Court explicitly rejected the *Daimler* plaintiffs' request that it approve "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business,'" characterizing the plaintiffs' formulation as "unacceptably grasping." *Id.* at 761 (citations omitted).

Here it is undisputed that BNSF is not "at home" in Montana. Petitioner is not incorporated in Montana, nor does it maintain its principal place of business there. Thus, for a Montana court to properly exercise personal jurisdiction over BNSF to adjudicate the plaintiffs' claims, it may do so only on the basis of "specific jurisdiction"—that is, a showing that each claim "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Id.* at 754 (internal quotations omitted). The plaintiffs in this

case do not even purport to satisfy that requirement. And where, as here, specific jurisdiction over a corporate defendant is lacking, general jurisdiction may be exercised only if the corporation's contacts with Montana are so extensive as to render it "at home" there.

Before any court can assert personal jurisdiction over a defendant in a federal question case, that court must first determine whether the exercise of jurisdiction "comports with the limits imposed by federal due process." *Daimler*, 134 S. Ct. at 753. The Montana Supreme Court's decision thus expands the scope of general personal jurisdiction well beyond its constitutional bounds. By authorizing out-of-state defendants to be sued in a forum without regard to whether they are "at home" there—even though the plaintiff's claims bear *no* relationship to that forum—the decision below erodes the vital due-process limitations on personal jurisdiction this Court recognized in *Daimler*.

Simply put, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse state courts from their duty to accord defendants appearing before them with due process of law. *See* U.S. Const. amend. XIV, § 1. Those constraints impose firm limits on the authority of courts to exercise jurisdiction over claims and defendants that lack a sufficient connection to the forum:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State

> has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

That the plaintiffs' claims in this case are brought under FELA makes no difference. Even if FELA explicitly provided for personal jurisdiction in this case—and it obviously does not—that would not sweep aside the constitutional limits imposed by due process. Like all federal statutes, FELA is "subject to the requirements of * * * the Due Process Clause," *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985), and Congress has "no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

Indeed, serious constitutional concerns would arise if this court were to interpret FELA as somehow permitting Montana courts to exercise general personal jurisdiction over BNSF in this case. To avoid any entanglement with those questions, the Court should interpret FELA as consistent with the bright-line rule announced in *Daimler*: state courts lack general personal jurisdiction over a corporate defendant unless that defendant is "at home" in the forum state.

II. FELA Does Not Expand the Personal Jurisdiction of Montana State Courts, Nor Could It

The Montana Supreme Court held that "state courts [may] hear cases brought under the FELA even where the only basis for [personal] jurisdiction is the railroad doing business in the forum state." Pet. App. 8a, 12a-13a. That holding is contrary to the plain language of FELA and this Court's own precedents interpreting it. And even if Congress desired—under FELA, or otherwise—to extend the *in personam* jurisdictional reach of state courts to defendants who are not "at home" in the forum state, it could not permissibly do so.

A. FELA Does Not Purport to Alter or Expand the Personal Jurisdiction of State Courts

In enacting FELA, Congress clearly did not extend the bounds of state courts' general personal jurisdiction over nonresident defendants. Section 56 of FELA provides:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56. To the extent that § 56 delineates possible venues for a FELA action, that delineation has *nothing* whatsoever to do with personal jurisdiction. *See, e.g., Barrett*, 361 Or. at 129 ("Nothing in section 56 purports to confer personal jurisdiction over out-of-state corporate defendants in state or federal courts."); *State ex rel. Norfolk Southern*, No. SC95514, slip op. at 3 (holding that FELA "does not provide an independent ground for jurisdiction in FELA cases in state courts that do not otherwise have personal jurisdiction over the defendant").

As a preliminary matter, statutory limits on venue should not be mistakenly conflated with constitutional limits on personal jurisdiction. Venue assesses whether litigation in a particular geographic location is convenient, whereas personal jurisdiction considers whether a particular governmental body's courts can compel the defendant to appear. Accordingly, "the question of whether venue within the state's borders would be burdensome is analytically distinct from the question of which governments can compel a defendant to appear within those borders." Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After* Walden v. Fiore, 19 Lewis & Clark L. Rev. 769, 780 (2015).

As this Court has carefully explained, "[t]he question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180

(1979); *see also Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) ("The question [for personal jurisdiction] is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant."). Because personal jurisdiction and proper venue are wholly distinct requirements, the fact that Congress altered venue does not show that it altered personal jurisdiction. Accordingly, a statute like FELA that merely delineates a number of potential venues assumes *nothing* about whether personal jurisdiction exists over any given defendant. Rather, such jurisdictional determinations must be made, as always, on a case-by-case basis.

Moreover, under any plausible reading of FELA, the simple fact that this case is pending in *state* court, rather than *federal* court, is entirely dispositive of the question presented here. On its face, § 56's authorization to bring an action wherever a defendant is "doing business" applies only "in a district court of the United States," not any court located *within* the United States. Indeed, "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *Nicastro*, 564 U.S. at 884 (plurality op.).

In other words, federal venue statutes reflect Congress's intent "that venue should always lie in *some federal court* whenever *federal courts* have personal jurisdiction over the defendant." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 578 (2013) (emphases added). And the fact that "[f]ederal courts ordinarily follow *state* law in determining the bounds of their

jurisdiction over persons," *Daimler*, 134 S. Ct. at 753 (emphasis added), further undermines any contention that § 56 provides an independent basis for a Montana court to exercise personal jurisdiction over BNSF in this case. At bottom, nothing in FELA purports to define the *in personam* jurisdictional reach of *state* courts.

Nor does § 56's perfunctory granting of "concurrent jurisdiction" over FELA claims to the "courts of the several States" alter the personal jurisdiction analysis in any way. The concept of "concurrent jurisdiction" extends to *claims*, not *persons*, and has always been understood to refer to subject-matter jurisdiction, *not* personal jurisdiction. *See, e.g., Haywood v. Drown*, 556 U.S. 729, 747 (2009) ("[T]he state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally *over the subject matter*.") (quoting 1 James Kent, *Commentaries on American Law* 374-75 (1826)) (emphasis added); *Growe v. Emison*, 507 U.S. 25, 32 (1993) (noting that "federal courts and state courts often find themselves exercising concurrent jurisdiction *over the same subject matter*") (emphasis added).

Stated differently, "concurrent jurisdiction" simply grants state courts the "authority" to "adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). For that reason, courts have interpreted § 56's grant of "concurrent jurisdiction" to the states as a grant of subject-matter jurisdiction over FELA *claims*—not a grant of all-purpose personal jurisdiction over out-of-state *defendants*. *See In re CSX Transp., Inc.*, 151 F.3d 164, 166 (4th Cir. 1998)

(explaining that § 56 "confers concurrent federal and state jurisdiction over FELA *claims*") (emphasis added).

This Court has stated explicitly that § 56 is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912). Rather, in granting "concurrent jurisdiction" over FELA claims to the state courts, Congress sought to debunk any notion that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts." *Ibid*; *see Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377, 387 (1929) ("As to the grant of jurisdiction in [FELA], that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned.").

Thus, § 56 grants subject-matter jurisdiction over FELA claims to the state courts, but only "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers*, 223 U.S. at 55.

B. FELA Cannot Be Construed as Extending the Reach of State Courts' Personal Jurisdiction

Whatever the extent of Congress's authority to establish the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the jurisdictional reach of *state* courts. This distinction is significant because the "first principle" of the

Constitution is that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *The Federalist* No. 45 (James Madison)).

As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Ibid.* The federal government is not granted "an indefinite supremacy over all persons and things," *The Federalist* No. 39 (James Madison), nor does the Constitution "confer upon Congress the ability to require the States to *govern* according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (emphasis added).

"Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts." Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 Stan. J. Complex Litig. 1, 19 (2014). Indeed, as Justice Frankfurter explained:

> Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that [apply] for every other litigant who seeks access to its courts.
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> The federal law in any field within which Congress is empowered to

> legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but *not* in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress.

Brown v. Gerdes, 321 U.S. 178, 190, 193 (1944) (Frankfurter, J., concurring) (emphasis added).

Although the Constitution imposes only due-process limitations on the exercise of personal jurisdiction by *federal* courts, it imposes both due-process *and* territorial limitations on the exercise of personal jurisdiction by *state* courts. *See, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 16 (2006) ("Despite the due process focus, the U.S. Supreme Court has never wholly discarded taking sovereignty concerns into account in its personal jurisdiction analysis."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 Tex. L. Rev. 1589, 1591 (1992) ("It is now reasonably clear that the source [of constitutional limitations on state court jurisdiction] is not just the Due Process Clause."). Those limitations serve both to protect litigants from inconvenient or distant litigation and to recognize limits on the sovereignty of each state with respect to affairs arising in other states.

Indeed, this Court has made clear that the

Constitution imposes unique *territorial* constraints on the exercise of personal jurisdiction by state courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. Personal jurisdiction also "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292-93 ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

As this Court has explained time and again, these principles of interstate federalism "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). So "when it comes to *federal legislative* power concerning *state judicial* power, state boundaries have constitutional significance." Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1119 (1993) (emphases in original).

While due process constrains the authority of both federal and state courts to reach across geographic borders to exercise personal jurisdiction over parties and controversies arising outside their borders, the geographic boundaries of the United States are vastly larger than those of any one state. *See Nicastro*, 564 U.S. at 884 (plurality op.) ("For [personal] jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any

individual state."). And yet, "[r]egardless of who is doing the legislating, the relevant boundaries are those of the sovereign that has created the court." Steinman, *supra*, at 1119.

So even if Congress wanted to expand the general personal jurisdiction of state courts to reach FELA defendants who are not "at home" in the forum state, it could not do so. Likewise, FELA cannot abrogate the sovereignty of the states, nor can it alter the Constitution's deliberate framework of interstate federalism. As a plurality of this Court has cautioned, allowing the wrong state to exercise jurisdiction over the citizens of another state "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *Nicastro*, 564 U.S. at 884 (plurality op.).

In sum, because § 56 of FELA does not authorize state courts to exercise general jurisdiction over nonresident defendants—nor could it—the judgment below should be reversed.

III. THE MONTANA SUPREME COURT'S DECISION DEPRIVES CORPORATE DEFENDANTS OF THE VERY PREDICTABILITY THAT *DAIMLER* PROVIDED THEM

Authorizing a state court to exercise general jurisdiction over every railway company "doing business" in the state would not only violate the Due Process Clause and disregard the sovereignty of the states, it would also destroy the very predictability that *Daimler* sought to provide by ensuring that companies are able to structure their affairs with

some confidence of not being haled into distant courts unexpectedly.

Among other things, due-process limitations on personal jurisdiction confer "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

This Court's bright-line rule in *Daimler* provides corporations with the necessary assurance that they will be subject to general jurisdiction in only one or two well-defined jurisdictions. A company's state of incorporation and principal place of business—the two jurisdictions where a corporation is always "at home" under *Daimler*—"have the virtue of being unique to the defendant." *Daimler*, 134 S. Ct. at 760. That is, "each ordinarily indicates only one place"—a forum that is "easily ascertainable." *Ibid.*

In contrast, most railway companies are "doing business" in any number of states. By permitting those activities to suffice for general jurisdiction, the rule adopted below would allow railway carriers to be sued in any state they touch by *any* plaintiff on *any* FELA claim arising *anywhere*. Railway companies would be completely unable to predict where any particular claim might be brought. Such unprecedented expansion of states'

personal jurisdiction over nonresident defendants would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp.*, 471 U.S. at 472).

Because it precludes companies with a multi-state presence from structuring their affairs with some minimal assurance as to where they will be subject to suit, the decision below wholly undermines the very predictability *Daimler* provided and should be reversed.

IV. THE MONTANA SUPREME COURT'S DECISION FURTHER INCENTIVIZES IMPROPER FORUM SHOPPING

As this Court has explained, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—*not* the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (emphasis added). At the same time, permitting a nonresident plaintiff whose claims have no relationship to the forum state to compel an out-of-state defendant to defend suit there rewards improper forum shopping and invites further abuse. Given the forum-shopping implications of the Montana Supreme Court's holding, it is all the more urgent that this Court reverse the judgment below to ensure that merely invoking FELA will not permit a plaintiff to circumvent the "at home" rule this Court announced in *Daimler*.

No matter their reasons, if the nonresident

plaintiffs in this case found it strategically advantageous to bring their FELA claims in Montana courts, other nonresident plaintiffs contemplating FELA suits will too. Indeed, there are dozens of FELA cases pending against BNSF in Montana state courts alone, all brought by nonresident plaintiffs alleging *no* Montana-related injuries, acts, or omissions. *See* Br. for Pet'r at 13 n.1 (Feb. 27, 2017). If upheld, the Montana Supreme Court's elastic approach to general jurisdiction will simply encourage more nonresident plaintiffs from across the country to pursue the same forum-shopping strategy.

Nor was Montana alone in this regard. In a recent decision, the Oregon Supreme Court considered jurisdictional arguments by a nonresident FELA plaintiff who sued BNSF in Oregon for alleged injuries that took place in Washington. *See Figueroa*, 361 Or. at 144. In that case, the plaintiff candidly admitted that she chose Oregon for her convenience and to avoid litigating the case in Washington, where interrogatories and expert discovery are allowed. Such gamesmanship should be discouraged, not rewarded, and the *Figueroa* plaintiff's strikingly candid admission that she filed suit in Oregon to evade Washington's discovery rules only reinforces that this Court should disincentivize future FELA plaintiffs throughout the country from engaging in similar behavior. Although the Oregon Supreme Court rejected Figueroa's jurisdictional arguments, other states might well follow Montana's lead if the decision below is not

reversed.[2]

Such forum shopping serves no useful purpose and is deeply unfair to litigants. This Court has long recognized that "it would be unfair for the character [or] result of a litigation materially to differ because the suit had been brought in" a particular forum. *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). Yet empirical research confirms that forum shopping can affect the outcome of cases because the venue in which a case proceeds very often impacts the result. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507, 1507 (1995) (analyzing three million cases terminated over 13 years and finding that "plaintiffs' rate of winning drops from 58% in cases in which there is no transfer [of venue] to 29% in transferred cases"—an effect that "prevails over the range of substantively different types of cases").

Forum shopping also erodes the integrity of the civil justice system. Indeed, "[f]orum shopping conjures negative images of a manipulable legal system in which justice is not imparted fairly or predictably." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C.L. Rev. 889, 892 (2001). For example, allowing plaintiffs to have their suits tried

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[2] According to the Association of American Railroads, which filed an *amicus* brief in support of *certiorari*, there are at least 170 cases pending in state courts nationwide in which plaintiffs have asserted FELA claims in jurisdictions where the defendant railroad company is not "at home" and yet the FELA claim did *not* arise in the forum state. *See* Br. of Ass'n of Am. Railroads as *Amicus Curiae*, at 9 (Oct. 28, 2016).

and decided in more favorable but far-flung forums can facilitate "magnet jurisdictions." Such jurisdictions impose unwelcome administrative burdens on the courts and undermine local interests in procuring justice. As this Court has noted:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). Forum shopping thus undermines the legal system "by distorting the substantive law, by showcasing the inequities of granting plaintiffs an often outcome-determinative choice among many district courts, and by causing numerous economic inefficiencies, including inconveniences to the parties." Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1445 (2010).

Despite the Montana Supreme Court's admonition that "FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes," Pet. App. 5a, no injustice against railroad

employees results from enforcing bright-line jurisdictional rules. Even under *Daimler*, for example, each plaintiff in this case would still have at least *three* viable forums within which to bring his or her claims: the state where the injury was allegedly sustained, Delaware, and Texas. While applying the rule announced in *Daimler* may limit the number of state forums in which FELA plaintiffs may bring their claims, it does nothing to undermine the "humanitarian and remedial purposes" of FELA.

At bottom, if plaintiffs are allowed unfettered discretion to sue corporations anywhere the defendant arguably is "doing business," then plaintiffs' counsel will be perfectly free to shop claims to whichever forum they view as most plaintiff-friendly. These troubling forum-shopping incentives provide the Court with yet another reason to reject the Montana Supreme Court's sweeping and unworkable theory of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

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